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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Petitioners, City of Henderson, a Nevada Municipal Corporation, and James Goff, its Chief of Police (hereinafter "City" and "Henderson"), hereby submit a supplemental brief pursuant to Court Rule 15.7 for the purpose of calling this Court's attention to important intervening matters which have occurred subsequent to the October 11, 1994 filing of this petition for writ of certiorari (hereinafter "Henderson Petition in 94-662").

The City contends that the exercise of Article III jurisdiction as to the federal Complaint herein is barred for two separate and distinct reasons: (1) the Eleventh Amendment to the U.S. Constitution so commands,[1/] and (2) this Court's judgment and opinion in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton

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1/ See Henderson Petition in 94-662 at pages 54-55 for a statement of the "first principle" perquisites (rights) flowing from state sovereignty and the Eleventh Amendment command: "The judicial power of the U.S. shall not extend to any suit in (Footnote Continued)

Christian Schools, Inc., 477 U.S. 619 (1986) require abstention (as a corollary right arising out of the Eleventh Amendment).

I

THE RECENT "CONDITIONAL USE" ZONING DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN 11126 BALTIMORE BLVD., INC. V. PRINCE GEORGE'S COUNTY, MD., 32 F3d 109 (AUG. 12, 1994) ATTESTS TO THE CORRECTNESS OF THE CITY'S ACTIONS ON BEHALF OF THE SOVEREIGN STATE OF NEVADA IN DEMANDING ABSTENTION AS A "SOVEREIGN RIGHT" UNDER THE ELEVENTH AMENDMENT.

Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's Eleventh Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh

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(Footnote Continued)
law or equity...", a copy of which is attached at Appendix B-4 to this Brief.

Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine. See Henderson Petition for Writ of Certiorari in No. 90-1771 at pp. 51-61; Petition for Writ of Certiorari in No. 92-643 at pp. 7-12; Petition for Writ of Mandamus in No. 93-1969 at pp. 11-16, and Supplemental Brief at pp. 9-20; and Petition for Writ of Certiorari in No. 94-662 at pp. 51-64 [a copy of which pp. are attached at Appendix B-1, B-2, B-3, and B-4 to this supplemental brief]. Compare U.S. v. 37 Photographs, 402 U.S. 363 (1971).

During the past 4 years, the City has articulated its reasoning to this Court not only in general terms, but also with reference to the specific example the City had in mind, in its first petition for writ of certiorari in No. 90-1771 at pages 51-61, (see Appendix B-1 at pages 53-54 to this brief) in relation

to the opinion in 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 (CA 4 1989) - a lawsuit that was filed 8-1/2 years ago (May 1986).

The day before this petition in 94-662 was filed, the most recent Fourth Circuit Court of Appeals judgment in 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., was reported in the advance sheets for October 10, 1994, as 32 F.3d 109 (CA 4, August 12, 1994). That decision reversed the judgment and opinion of U.S. District Judge Frank A. Kaufman below in 828 F.Supp. 370 (July 27, 1992). The "arbitrary" nature of the Fourth Circuit's opinion which "says it all" (i.e. at page 113: U.S. District Court opinion states: "if six months is reasonable, then five months must be also; and, at 117, Fourth Circuit opinion states: "no it isn't"), attests: (1) to the correctness: of the City's determination that the interpretation of the "conditional use" zoning concept in Nevada should be given by the Nevada State Judges and not by members of the federal judiciary

[Watson v. Buck, 313 U.S. 367 (1941)]; and (2) that City of Henderson v. Nevada Entertainment Industries, Inc. et al., is a proper case for the City, acting for the State of Nevada, to pursue a constitutional challenge and a Judgment of this High Court which will attest to the fact that the State of Nevada does possess a "sovereign right" as a "Sovereign State" upon demand, to have newly enacted legislation interpreted by the State Courts, under the Eleventh Amendment. (See footnote 1 on page 2, supra.)

II

NEW MATTER PRESENTED

The refusal of the Ninth Circuit panel [Browning, Canby, Jr., and Kelleher] in its November 2, 1993 opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993) to address Henderson's claim to a first principle "sovereign right"[2/] under the Eleventh Amendment as a "Sovereign State," which was posed on the City's cross-appeal, and the

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2/ That is, whether the U.S. District (Footnote Continued)

subsequent withdrawal by that Court of its November 2, 1993 opinion on April 7, 1994, which addressed only the subsidiary issue relating to Henderson's claim to a corollary right[3] has, like the "call of the siren," "lured" Nevada Entertainment Industries, Inc., into actively pursuing that panel's unexplained refusal to apply the U.S. Supreme Court's mandate in Huffman and Dayton which it previously had, in a formal published opinion in 8 F.3d 1348, found to be binding rules of law.

(Footnote Continued)
Court was barred from assuming jurisdiction of the federal complaint, because its Article III power is limited by the provisions of the Eleventh Amendment, as here, where the State's right to license businesses, and punish fraud may not (wrongfully) be interfered with.

3/ That is, whether the federal complaint must be dismissed because of this Court's judgment and opinion known as the Huffman abstention doctrine, as extended by this Court's holding in Ohio Civil Rights Commission v. Dayton Christian Schools, supra, which rights are predicated upon the assumption and conclusion that the assertion of such (concurrent) jurisdiction may or will interfere with the Sovereign's Right under the Eleventh Amendment.

At a bare minimum, the Huffman precedent, where applicable, customarily evokes a ruling that the federal complaint was barred and must be dismissed, as was the Ninth Circuit's final judgment on November 2, 1993 in the Henderson cross-appeal below. Almost without exception, the foundational Eleventh Amendment question is rarely discussed, and in this case, was deliberately avoided by the Court of Appeals. See, however, the exception in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987), at 1084, discussed at Point III, on page 14, infra. See, also, the scholarly observations of U.S. District Judge Wiseman in a series of five opinions over a three year period in Federal Express Corp. v. Tennessee Public Service Commission, etc., 693 F.Supp. 598 (M.D. Tenn., 1988); 878 F.2d 381 (CA 6, 1989); 878 F.2d 1483 (CA 6, 1989); 738 F.Supp. 1140 (M.D. Tenn., 1990); and 925 F.2d 962 (CA 6, 1991).

In his petition for rehearing, attorney Diamond had argued that the converse proposition must be true: i.e. that (1) the silence of the Ninth Circuit Court on the Eleventh Amendment "jurisdictional" issue, and (2) the withdrawal of the November 2, 1993 Judgment applying Huffman abstention was a sub silentio holding that the federal Court: (a) did have subject matter jurisdiction to hear the complaint, and (b) was not restricted by the Huffman and Dayton opinions.[4/]

In his Petition for Rehearing, attorney Diamond also argued, unsuccessfully, that the Court should hear the "facial" attack which Nevada Entertainment's

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4/ To come to such a conclusion under the assumption that, for some unexplained reason, Huffman does not apply, is one thing; for the Ninth Circuit to reach the same conclusion regarding the Eleventh Amendment provision on the record below -- the federal Court's wrongful interference herein, with the Sovereign Right of the State of Nevada to utilize the State's judicial system to adjudicate a state initiated license revocation enforcement proceeding [revoking a municipal license

(Footnote Continued)

federal complaint also alleged, and which was not before the quasi-judicial fact finding body, except as it was pleaded by Nevada

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(Footnote Continued)
based upon fraudulent statements made by the license applicant in its license application] -- is incomprehensible.

Once the State's judicial power has been invoked (through "on-going" proceedings subject to judicial review):

(1) the federal court cannot exercise jurisdiction over the same subject matter without wresting control from the state by enjoining the state proceedings (as was done in this case). This, in effect, makes the State judicial system a "defendant" in the federal action -- a state's Sovereign Right to be free from such federal intrusion is the very reason the Eleventh Amendment was adopted!

(2) the federal courts cannot Constitutionally interfere with the State's on-going adjudication, unless the State's judicial system is shown to be "inadequate," and "a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." [Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), at 15]; and the federal plaintiff has the burden of proof in federal court of establishing that the state judicial system will violate federal constitutional law.

(3) If the federal complaint contains no recited facts, which if proven, would show that the state judicial system is "inadequate," the federal plaintiff has not only failed to state a cause of action -- the federal plaintiff has also failed to file a complaint which invokes federal jurisdiction, and the federal complaint must be dismissed.

Entertainment as an affirmative defense in his answer to the City's complaint. Having failed with that argument, Nevada Entertainment, nevertheless, did on October 7, 1994, file a frivolous Petition for Writ of Certiorari in 94-786 in support of that contention (hereinafter "Nevada Entertainment Petition in 94-786"), in which Nevada Entertainment has frivolously misrepresented the facts and record below.

Henderson's Respondents' Brief in Opposition to Nevada Entertainment's Petition in 94-786 (containing a copy of the Reply Brief in 94-662 filed on November 28, 1994 as Appendix A thereto), filed in 94-786 on December 1, 1994 (see copy at Appendix "A" to this supplemental brief in 94-662) clearly establishes: (1) the Henderson quasi-judicial license revocation hearing was and is still "pending" before the City Council and had not been terminated when Nevada Enterprises filed its federal complaint on April 24, 1990;

(2) it clearly was, therefore, a "closed question," which had been answered eight years earlier by this Court's 1986 decision in Dayton Christian School (as the Ninth Circuit's opinion in 8 F.3d 1348 so held) and was not an "open question." For a case containing a fact situation where the quasi-judicial proceedings had conclusively been terminated, see, the example described in O'Neill v. City of Philadelphia, 32 F.3d 725, at 746 (CA 3, Aug. 5, 1994), petition for writ of certiorari filed in this Court on November 30, 1994, as 94-982);

The City contends that Nevada Entertainment's attempt to proffer the statement of facts in the petition for writ of certiorari as such to this Court, in the face of the record which indisputably shows the exact contrary, makes Nevada Entertainment's filing in Petition 94-687 a frivolous filing which is subject to sanctions.

Further, as Henderson's Respondents'

Brief in Opposition (filed on December 1, 1994) points out, even if that were so, (which it clearly is not), the federal Court still would lack "subject matter jurisdiction" under its Article III powers and the Eleventh Amendment, and Huffman v. Pursue, Ltd., supra, in accordance with the analysis and distinctions recently drawn by the Ninth Circuit panel of Judges in Dubinka v. Judges of the Superior Court, 23 F.3d at 222 and 225-226 (CA 9, April 8, 1994), which points out the functional difference between the Feldman doctrine, 460 U.S. at 486-488 and the Huffman abstention doctrine. See Supplemental Brief to Petition for Writ of Mandamus in Case 93-1969, at pages 19-20, and Point I(C) of the Henderson's Petition in 94-662 at pages 61-64 [copies of which are attached at Appendices B-3 and B-4 to this supplemental brief].

The final judgment in O'Neill v. City of Philadelphia, 32 F.3d 725 (Aug. 5, 1994), petition for writ of certiorari

filed in this Court on November 30, 1994, as 94-982, contains rulings on several quasi-judicial proceedings, some in which the state quasi-judicial hearing was "pending" and thus was a "closed question" which has been decided in Dayton Christian Schools, and others in which the state hearing had been terminated and thus was an "open question." See page 746. The majority opinion of Judges Garth and Roth, and the dissenting opinion of Judge Lewis in the O'Neill case are realistic examples of the conflict which exists on the Ninth Circuit of 38 justices -- yet neither opinion addresses the fundamental question relating to the "first principle," Eleventh Amendment "sovereign right" of each State, as a Sovereign, herein claimed by the State of Nevada. The City respectfully submits that, to restore balance in such abstention litigation (involving the Eleventh Amendment), the concepts urged in the City's petition must be reconsidered. This Court should, therefore, grant the

petition in both the City of Philadelphia and the City of Henderson cases and set those cases for briefing and oral argument in tandem on the Jurisdictional Questions Presented in Henderson's Petition in 94-662 and in such other cases.

Because Nevada Entertainment's Petition in 94-786 is inextricably related to Henderson's Petition in 94-662, Henderson requests this Court to consider the merits of both petitions and the Petition in O'Neill 94-982, also, at the same conference; and to also consider in Case 94-662 the two Questions which are presented at pages i, ii, iii, and iv of the City of Henderson Respondents' Brief in Opposition in 94-786 as subsidiary questions to Questions I, II, III, IV and V previously raised in Henderson's Petition in 94-662.

III

THE CONFLICT WITHIN THE NINTH CIRCUIT (38 JUDGES) IS A MAGNIFICATION OF THE "CONFLICT BETWEEN CIRCUITS," DESCRIBED IN RULE 10.1(A) AS "COMMON GROUNDS" FOR GRANTING CERTIORARI.

One of the common grounds for

granting certiorari is a conflict between circuits (see Rule 10.1(a) of the U.S. Supreme Court Rules). The present problem in the Ninth Circuit is a magnification of that ground. Counsel of Record submits that of the 38 judges on the Ninth Circuit (see attached list at Appendix C), only those participating in Dubinka have demonstrated a clear understanding as to the "jurisdictional" (subject matter jurisdiction) meaning of Younger-Huffman abstention, and its interaction with the Eleventh Amendment. Argument in relation to the Eleventh Amendment, as in this case, is shunned as thought it were a plague, rather than a revered constitutional right belonging to each Sovereign State. See, for example, the divergent view of Circuit Judge Tang, expressed in World Famous Drinking Emporium, Inc. v. City of Tempe, as viewed in the light of Circuit Judge Tang's dissent in Members of Cal. Democratic Cong. Delegation v. Eu, 790 F.Supp. 925 at 935 (N.D. Cal. 1992), reversed in

Benavidez v. Eu, 34 F.3d 825 (Sept. 1, 1994), neither of which opinions has seen the need to address the specific Eleventh Amendment Constitutional issue raised by Judge Anthony M. Kennedy in the City of Tempe concurring opinion.

U.S. Circuit Judge Tang's vociferous dissent, in the three-judge court opinion in 790 F.Supp. 925, at 933-937, presents the "key" to the Ninth Circuit's problem. The Huffman test, where applicable, requires a finding of "extraordinary circumstances" before the federal court can acquire subject matter jurisdiction. Even where Huffman is clearly applicable, Judge Tang continues to apply the same test which controls other abstention doctrines, which requires the "converse" consideration - a finding of "extraordinary circumstances" before the Court can abstain. If Judge Tang's dissenting opinion in Members of Cal. Democratic Cong. Delegation v. Eu, 790 F.Supp. 925 at 935 (N.D.Cal. 1992) is read in tandem with his majority opinion

in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (CA 9, 1987), it can be seen that Judge Kennedy is differing with him and saying that, in Huffman abstention cases, only the Huffman test is to be applied. Thus far, Judge Tang's approach which pays scant attention to "State Sovereignty" concerns has eclipsed Judge Kennedy's "logical" Eleventh Amendment analysis. Most of the Ninth Circuit Judges ignore the Eleventh Amendment commandments that "the judicial power of the U.S. shall not be construed to extend to any suit in law or equity..." (our emphasis) in their analyses, which is resulting in skewed decisions.

The advance sheets, reporting the Benavidez case, were delivered by mail on Saturday, November 14, 1994. Based upon Eleventh Amendment considerations, the City of Henderson contends that U.S. District Court Judge Legge's opinion in Member of the California Democratic Congressional Delegation v. Eu, for the 3-judge court in 790 F.Supp.

925 (Mar. 3, 1992), correctly reflects Eleventh Amendment "concerns" that "the Judicial Power of the U.S. shall not be construed to extend to any suit in law or equity...." Compare, Judge Poole's flawed opinion for the Court in Benavidez v. Eu, 34 F.3d 825, at 829 (Sept. 1, 1994), that Younger abstention is not jurisdictional, with his opinion to the contrary in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 (CA 9, 1994), the latter of which requires a dismissal of the Complaint under Younger, without reference to the realistic fact that such dismissal is mandated by the Eleventh Amendment commandment quoted above, "The Judicial Power of the U.S. shall not be construed to extend to any suit in law or equity...." and is predicated on State Sovereignty concerns. Circuit Judge Tang's dissent in the three-judge court below in 790 F.Supp. 925, at 933-937, and U.S. Court of Appeals Judge Poole's opinion upon appeal in Benavidez re "subject matter jurisdiction"

should be reexamined by this Court during oral argument on the question of "subject matter jurisdiction" in Watson v. Buck, Huffman, Dayton, and other reported abstention cases which, by their very nature, involve Eleventh Amendment principles and concerns. See, for example, the related problems in Emison v. Grove, 782 F.Supp. 427 (D.Minn. 1992); Cotlow et al. v. Emison et al., No. 91-1084, ___U.S.___, 116 L.Ed.2d 764 (1992), and this Court's unanimous decision in Growe v. Emison, 507 U.S. ___, 122 L.Ed.2d 388 (1993).

When a state agency makes its judgment as to whether it should file an appeal in the Ninth Circuit on the abstention issue, the decision making authority is faced with the prospect that the panel of judges which will be assigned to hear that particular case will be chosen from a list of 3-judge panels, of geometric proportions, derived from permutations and combinations of those 38 judges. If the assigned panel of judges in a given case

were to consist of Judges Cynthia Hall, Betty Binns Fletcher, and Justice Kennedy, one would have a "sure-winner." See Dubinka, supra, and World Famous Drinking Emporium, supra. If the panel were Circuit Judges Tang, Ferguson, and Browning, one would have a "sure-loser" -- on the same facts. The end result is a game of "Russian roulette," with the very likely prospect of an award of attorney fees, which can be quite substantial, to the "prevailing party plaintiff." The odds are stacked in the wrong direction and bad decisions are not being appealed for that reason.

CONCLUSION

This Court should grant the petition for a writ of certiorari in the O'Neill petition in 94-982, and in the Henderson petition in 94-662, and set both cases for argument in tandem, on the questions raised in both of those cases.

Dated: December 14, 1994

James J. Clancy

APPENDIX A

HENDERSON'S RESPONDENTS' BRIEF IN OPPOSITION IN CASE NO. 94-786, WITH COPY OF PETITIONERS' REPLY MEMORANDUM IN NO. 94-662 ATTACHED AS APPENDIX A THERETO.

[Reference: Petitioners' Supplemental Brief in No. 94-662 at pages 10-11.]

Text reads:

" Henderson's Respondents' Brief in Opposition to Nevada Entertainment's Petition in 94-786 (containing a copy of the Reply Brief in 94-662 filed on November 28, 1994 as Appendix A thereto), filed in 94-786 on December 1, 1994 (see copy at Appendix "A" to this supplemental brief in 94-662) clearly establishes: (1) the Henderson quasi-judicial license revocation hearing was and is still "pending" before the City Council and had not been terminated when Nevada Enterprises filed its federal complaint on April 24, 1990; (2) it clearly was, therefore, a "closed question," which had been answered eight years earlier by this Court's 1986 decision in Dayton Christian School (as the Ninth Circuit's opinion in 8 F.3d 1348 so held) and was not an "open question."

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY RESPONDENT CITY OF HENDERSON ET. AL., IN RELATION TO ELEVENTH AMENDMENT INFIRMITIES IN LIEU OF PETITIONER NEVADA ENTERTAINMENT'S QUESTIONS 1, 2, AND 3.

I

Whether the filing of the federal civil rights complaint by Nevada Entertainment Enterprises, Inc., a Nevada Corp. and citizen of the State of Nevada, in the U.S. District Court for the District of Nevada on April 24, 1990, while the Nevada State License Revocation Proceedings were still pending before the City Council of Henderson sitting as a Nevada Quasi-Judicial Board of Fact Finders, in which a quasi-judicial order of business license revocation by the Henderson City Council had been voluntarily stayed for 10 days by the City Council from its issuance on April 16, 1990 to May 1, 1990, for the purpose of permitting Nevada Enterprise to appeal such license revocation order to the Nevada District Court, under the State of

Nevada procedure, and Nevada Enterprises' procurement and execution of a compulsory federal temporary restraining order, and compulsory preliminary injunctions of the U.S. District Court and the U.S. Court of Appeals, which extended the City Council's stay order indefinitely and interfered with the State of Nevada's Administration of the judicial procedures; constituted a "patent" violation of the Eleventh Amendment to the Federal Constitution by Nevada Entertainment which, per force, ousted the federal courts of subject matter jurisdiction and required the U.S. District Court and Court of Appeal to abstain and dismiss such Complaint in the U.S. District Court under this Court's binding precedents in Huffman v. Pursue Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools Inc., 477 U.S. 619 (1986).

II

Whether the City of Henderson was denied due process of law by the Ninth Circuit Court of Appeals' (Browning, Canby, and Kelleher) Order of April 7, 1994 withdrawing its opinion in 8 F3, 1348, without cause and without explanation, and refusal of that Court to apply (as the law of the case) the rulings of this Court in Huffman v. Pursue Ltd., supra, and Ohio Civil Rights Commission v. Dayton Christian School, Inc., supra, which the Ninth Circuit on November 2, 1993 had held to be binding precedent in Nevada Entertainment Industries Inc. v. City of Henderson, 8 F3, 1348, and which required the federal court to dismiss the federal complaint, but which refused to rule upon the City's additional claim that the dismissal was predicated upon an Eleventh Amendment violation; and for lack of subject matter jurisdiction, and where such refusal, and subsequent withdrawal has caused Nevada Entertainment

Inc., thereafter, in its Response in No. 662 and its Petition in No. 786, to change its prior arguments, and to file this petition for writ of certiorari under a (different) rule of law which had not, theretofore, been available to it under the Huffman v. Pursue, and Dayton Christrian School rulings which required a dismissal of the federal civil complaint for violation of the Eleventh Amendment, see Petition for Writ of Certiorari in 94-662 at pages 32 and 33, and 34.

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In the Supreme Court
of the
United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP
Petitioners,
vs.
CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents City of Henderson, a Nevada Municipal corporation, and JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, respectfully request that this Court summarily deny Nevada Entertainment's petition for writ of certiorari, seeking review of the Ninth Circuit opinion in this case which is unreported, as a frivolous petition,

without any merit whatsoever, or consolidate this Petition with the City of Henderson's Petition in Case No. 662 and set both Petitions for argument and decision on the questions raised in Case No. 662.

THE NEVADA ENTERTAINMENT STATEMENT OF FACTS IS EGREGIOUSLY IN ERROR.

The petitioners' NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP (hereinafter "Nevada Entertainment) statement of the facts, which appears at pages 4-8 under the heading "Statement of the Case", is egregiously in error, and is fatally flawed in relation to Nevada Entertainment's present election, after 4 years of litigation, to "change its tune" and now argue for the first time, in the face of uncontrovertible facts to the contrary, that it pleaded an "independent action in the federal court which has raised a serious challenge to the

constitutionality of the ordinances themselves. See page 5 at lines 6-15 reading:

> "The action was filed after the City of Henderson had decided to revoke Nevada Entertainment's business license on the ground that it fraudulently obtained a business license from the City by misrepresenting to the City the nature of the business it intended to operate in the City of Henderson. Instead of seeking judicial review in the Nevada State Court of the revocation order Nevada Entertainment filed the instant independent action in the federal court challenging the constitutionality of the ordinances themselves." (Our emphasis).

The above statements of fact at page 5 and others at pages 4-8 are totally false because such language has been carefully crafted and purposely omits other essential "facts' which are necessary for a proper understanding of their full and truthful meaning and significance, and should be totally disregarded for the special purpose intended by Nevada Entertainment in their petition in No. 786. (As a substitute therefore, the City of Henderson has setforth hereinafter at

pages 5-38 the Statement of Facts in the City's Petition for Writ of Certiorari in Case No. 94-662 at pp. 3-36). The "irregularity", described above, also appears in Nevada Entertainments' Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in City of Henderson, a Nevada Municipal Corporation, et al. v. Nevada Entertainment Industries, Inc., a Nevada corporation and Daniel Bishop, in the Supreme Court of the United States, October Term 1994, No. 94-662, Docketed on October 11, 1994. There, the Petition of the City of Henderson dealt with said "irregularity" in a comprehensive manner in its Reply Brief. The Reply Brief in No. 94-662 is equally relevant to this Petition in 94-786. A copy thereof is attached at Appendix A to "Respondents Brief in Opposition" herein in No. 94-786.

The Statement of Facts in the City's Petition includes the City's use of the "clean hands" equity doctrine, res

judicata, collateral estoppel and other such facts which are "selectively omitted" in the Nevada Entertainment petition.

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zongin Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under State law and the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses

which required application for a conditional use permit (as to which Nevada Entertainment, Inc. has never filed an application).

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a revenue based business license, indicating that their intended use of the property would be that of an "adult business." In applying for the business license, Federal Plaintiffs learned of the new provisions for sexually oriented adult businesses, including the need to apply for a zone change or variance, and a request for a conditional use permit, to permit them to operate such a business at their specific location.

Federal plaintiffs were informed by

the City that, under the applicable zoning provisions, the site they had rented was not then zoned for "adult use," and that if they wanted to operate an "adult use," they would have to request a variance or change in zoning.

Federal plaintiffs asked City officials if they could immediately open for business if they decided to operate a different use, such as a general video store (which was a separate and distinct use from an adult business under the new zoning code). They were told that their rented site was zoned for use as a general video store, but since this was a change in the described use in their business application form, they could qualify for issuance of a business under that use only if they resubmitted their business license application and indicated their intention to open a general video store.

Federal plaintiffs did not apply for a zone change or variance or conditional use permit. Instead, they submitted an

amended application for a business license, in which they intentionally and with knowledge of the substantive difference between the two categories, applied for permission to operate a business fraudulently described as "mass media books and video store, novelty shop, etc.," rather than using the correct category of "adult business."

In September of 1989, federal plaintiffs, on the basis of this intentional misrepresentation, were issued a revenue-based business license to operate a general video store on the Premises located at 1100 Boulder Highway, Henderson, Nevada, under the name "Fantasy Video Plus."

The operation opened for business in or about February 1990. Although Federal Plaintiffs had represented to the City during the business license application process that the business use for "Fantasy Video Plus" would be that of a general video store, they immediately operated the

same as an "Adult Business." Federal plaintiffs admit in this action and have stipulated that since opening for business they have used the Premises for the continuous operation of a different business use, i.e. that of an Adult Business.

An Adult Business is a business use separate and distinct from a general video store. In the course of making application for their business license, federal plaintiffs had been made aware that there was a substantive difference between the two uses (general video vs. Adult Business), and had affirmatively assured the Community and Planning Departments' inspecting official that the business was not an "Adult Business" but was rather a general video business. See paragraph 6 of Licensees' Answer to Complaint, filed before the Henderson City Council in In the Matter of the Disciplinary Action Against the Business License of Nevada Entertainment

Industries, Inc., Danile Bishop, and Francisco S. Villapando d/b/a Fantasy video Plus, a copy of which appears at Appendix 1-11 of the Petition for Writ of Certiorari in Case NO. 92-943.

When the licensees' deception came to the attention of the City inspectors, state law enforcement action was commenced through the filing of a complaint and the initiation of administrative license revocation proceedings against Federal Plaintiffs, which sought the revocation of the business license issued to the operation "Fantasy Video Plus," on the grounds that licensees had deliberately made fraudulent and material misrepresentations in their business license application in order to secure immediate issuance of the license. This state administrative enforcement action came before the City Council for hearing on April 10, 1990.

At the state license revocation proceedings, it was determined that

federal plaintiffs' misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues they sought to relitigate in their federal civil rights complaint under 42 U.S.C. Section 1983. (See Federal Plaintiffs' Answer to the City of Henderson Summons and Complaint before the City Council in license revocation proceedings, appearing as Appendix 1 in the Petition for Writ of Certiorari in Case No. 92-643.

The (quasi-judicial) administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for a period of ten days, in

Industries, Inc., Danile Bishop, and Francisco S. Villapando d/b/a Fantasy video Plus, a copy of which appears at Appendix 1-11 of the Petition for Writ of Certiorari in Case NO. 92-943.

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The (quasi-judicial) administrative enforcement hearing resulted in a written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for a period of ten days, in

order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by the municipal licensing ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") 4.06.160]. See copy of the City Council's findings of fact, conclusions of law, and order attached at Appendix 2 to the Petition for Writ of Certiorari in Case No. 92-643. Federal Plaintiffs incorrectly asserted at page 14 of their brief on appeal that the City "stayed its decision" for ten days. The correct statement is that the City, by its order dated April 16, 1989, revoked licensees' business license, but stayed enforcement action on the revocation, for a period of ten days, in order to allow the licensees an immediate and unfettered opportunity to have this revocation action reviewed by the state court, as provided by state law and municipal ordinance.

Instead of appealing the City

Council's (quasi-judicial) administrative factfinding and license revocation in state court, licensees filed this action in federal court as a defense to the City's enforcement action (which was pending because of the stay issued and the existence of a statutory right to appeal the City's action within the state judicial system), thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

It is important to note at the outset of these Statement of Facts that the gravamen of the 42 U.S.C. Section 1983 complaint is its federal interference with state judicial procedures, (not with mere City functions). The City, in defending against the civil rights complaint, is acting as an agent of the State and is relying upon the Eleventh Amendment, because it is claiming interference with the State's judicial procedures for review

of quasi-judicial findings-of-fact by municipal agencies.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. At the hearing on the TRO, Assistant City Attorney Liza Conroy cited New York Football Giants, Inc. v. L.A. Chargers Football Club, Inc., 291 F.2d 471, at 474 (1961), and unsuccessfully invoked the "clean hands" equity doctrine, and the City Council's quasi-judicial finding of "fraud" as ground for requiring the United States District Court to rule that it lacked subject matter jurisdiction and to deny the equitable relief sought (injunction) and to dismiss the civil rights complaint for "lack of subject matter jurisdiction." (Note, in this regard, the City of Henderson's response dated January 16, 1994, to Attorney Diamonds Petition for Rehearing at Appendix Page 4-16 and 4-17 of No. 94-662.

that shortly thereafter (3 months later) the Ninth Circuit withdrew its November 2, 1993 Opinion and substituted its May 4, 1994 Memorandum.

On June 4, 1990, following oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed. A copy of the Temporary Restraining Order and Preliminary Injunction is attached at Appendix 3 and 4 to the Petition for Writ of Certiorari in Case No. 92-643.

After further study of the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., supra, as impacted by the United States Supreme Court's ruling in Hicks v. Miranda, 422 U.S. 332 (1973), the City of Henderson declared their refusal to consent to federal jurisdiction [see

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990 (setting forth the same issues which were present in the federal civil rights complaint); and (2) a motion to dismiss the Civil Rights lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based, and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present all of their federal constitutional claims in the Nevada law enforcement lawsuit. (See, in this regard, Question 4 in Case 94-662 and the clash, in such cases, with respect to the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411

(1964).

The City of Henderson further requested that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

On March 22, 1991 (almost six months after Defendants herein had filed their motion to dismiss and request for an immediate hearing), the United States District Court herein filed its opinion and order which denied the Defendants' motion to dismiss, on the basis of the Court's interpretations of the same cases and set the case for a pretrial hearing on the following week, Friday, March 29, 1991. A copy of the March 22, 1991 Opinion and Order is attached at Appendix 16 to the Petition for Writ of Certiorari in 94-662.

On March 29, 1991, Defendants indicated to the United States District Court at a pre-trial conference that they

intended to file a Motion in which they would request the Court to amend its order of March 22, 1991, so as to authorize an immediate appeal to the Ninth Circuit Court of Appeals and, if necessary, to the United States Supreme Court, to decide the jurisdictional claim that the United States District Court lacks federal jurisdiction (subject matter jurisdiction) to interfere with Nevada's state right to adjudicate important State issues such as licensing (revocation) procedures and judicial review by the State of Nevada of the quasi-judicial fact finding of the City Council in which it revoked the license of Fantasy Video Plus because of the use of fraud in obtaining the business license. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. United States District Court Judge Lloyd George, without ruling on Defendants' motion on the abstention doctrine, indicated at said pre-trial conference that he wished to proceed quickly and hold

the trial within three to four weeks, and that such issues should be decided in an appeal from the merits, rather than an interlocutory appeal.

On April 1, 1991, Defendants filed their Motion to Amend re Interlocutory Order and Stay Proceedings. On April 9, 1991, Judge George entered an Order denying the Defendants' Motion to Amend his March 22 Order (to permit an interlocutory appeal). A copy of the April 9, 1991 Order is attached at Appendix 6 to the Petition for Writ of Certiorari in Case No. 92-643.

On April 15, 1991, Defendants filed a Petition for writ of mandamus and request for a stay with the Ninth Circuit Court of Appeals. In its pre-trial Petition for Mandamus, the City relied upon the jurisdictional issue which Huffman triggered, but did not argue the res judicata/collateral estoppel jurisdictional issue. On May 2, 1991, the Ninth Circuit issued an Order denying the

petition and request for a stay. A copy of the May 2, 1991 Order is attached at Appendix 7 to the Petition for Writ of Certiorari in Case No. 92-643.

On May 9, 1991, Defendants filed a petition for writ of certiorari with the United States Supreme Court, pursuant to Rule 13 of the Rules of the Supreme Court of the United States City of Henderson et al. v. U.S. District Court, Oct. Term 1990, No. 90-1771, together with an Application for Stay, addressed to the Honorable Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, pursuant to 28 U.S.C. 2101(e) and Rule 23 of the United States Supreme Court Rules, requesting a stay pending final action on the Petition for Writ of Certiorari. On May 20, 1991, Associate Justice O'Connor denied this Application.

Pursuant to 28 U.S.C. section 2101(f) and Rules 22.5 and 23 of the Supreme Court Rules, Defendants then resubmitted their Application for Stay, addressed to

Associate Justice Anthony M. Kennedy, together with a motion for an original writ of injunction, pursuant to the All-Writs Act, 28 U.S.C. section 1651(a) and United States Supreme Court Rule 23.1. This reapplication relied on Associate Justice Kennedy's concurring opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (9th Cir. 1987), which seemed to infer agreement with the Petitioner's contention that the United States Supreme Court had clarified Huffman, so as to require in a federal case such as this, a dismissal based upon lack of "subject matter jurisdiction." Justice Kennedy referred said Application to the entire Court for action, which denied the application on June 10, 1991.

Ultimately, the federal trial herein was continued to September 9, 1991.

On July 17, 1991, attorney Roger Jon Diamond, counsel for the federal Plaintiffs herein, sent a letter to Liza

Conroy, Assistant City Attorney for the City of Henderson, which referred to the joint case conference report due in the related state declaratory judgment action (City of Henderson v. Nevada Entertainment Industries, Clark County District Court No. A288647) (hereinafter "related state case"), and stated that state defendants would sign the report, but with the understanding that the Clark County District court case would not go to trial unless the City was successful in obtaining a dismissal of the pending federal case.

On August 9, 1991, the Scheduling Order in the related state case was filed, which set the matter for trial on the court's earliest available date beginning March 9, 1992.

On August 12, 1991, a Stipulation for Order continuing the federal trial herein and Order thereon was filed, which continued the federal trial date herein from September 9, 1991, to January 6,

1992, with calendar call on January 2, 1992.

On October 7, 1991, the United States Supreme Court issued an Order denying the petition for writ of certiorari in Case No. 90-1771. On December 2, 1991, the United States Supreme Court denied a petition for rehearing.

Both Plaintiffs and Defendants filed trial briefs, and submitted the case for trial on the briefs. By stipulation, the evidentiary record from the state quasi-judicial proceeding was filed with the U.S. District Court and designated to be used as the evidentiary record before the United States District Court on trial of the final injunction. It should be noted that the stipulation of the record of the State quasi-judicial proceeding into evidence clearly established the City of Henderson's claims that the federal court's exercise of jurisdiction presented a "collateral" attack on the City Council's order, warranting use of the All

Writs Act.

The City then renewed its motion to dismiss for lack of subject matter jurisdiction, and also moved to dismiss on the grounds of res judicata and collateral estoppel. At this point, the trial judge apparently became aware of the implications of the City of Henderson's refusal to waive its Eleventh Amendment privilege (and its claim of lack of "subject matter jurisdiction") and his refusal to apply the rule of law expressed in Miranda v. Hicks on the City's first Motion to Dismiss which was denied on March 22, 1991. See Appendix 16 to the Petition for Writ of Certiorari in 94-662. On June 17, 1992, the Honorable Lloyd D. George, U.S. District Judge for the District of Nevada, on his own motion, signed an Order which indicated that he had reconsidered the Defendants' request for an expedited appeal on the jurisdictional issue, and would amend his prior order denying that request. The

June 17th Order is attached at Appendix 8 to the Petition for Writ of Certiorari in Case No. 92-643. On July 2, 1992, the Court signed an order amending its prior Order of March 22, 1992 so as to certify the same for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). A copy of said Order is annexed to the Petition for Writ of Certiorari in Case No. 92-643 at Appendix 9.

On August 3, 1992, the U.S. Court of Appeals for the Ninth Circuit denied the City's Petition for Permission to Appeal Pursuant to 28 U.S.C. Section 1292(b) and F.R.A.P. Rule 5. See Appendix 10 to the Petition for Writ of Certiorari in case No. 92-643.

On October 13, 1992, the City of Henderson filed a Petition for Writ of Certiorari to the United States Court of Appeals in City of Henderson, a Nevada Municipal Corp. et al. v. U.S. Dist. Court, Dist. of Nev. [Nevada Entertainment Industries, Inc., a Nevada Corp. and

Daniel Bishop, Real Parties in Interest], Oct. Term 1992, No. 92-643.

On November 27, 1992, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL), see Appendix 1 to the Petition in 94-662, in which the Federal Court, in the face of the Huffman abstention doctrine and the Feldman doctrine, relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be

authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal

pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. See Supplemental Brief in Case No. 92-643, at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in Case No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion in which it

denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a Motion for Judgment of Dismissal on Grounds of Comity and Lack of Subject Matter Jurisdiction, pursuant to Huffman v. Pursue, Ltd..

On December 22, 1992 the Court of Appeals (Noonan and T.J. Nelson) filed an order: (1) denying the Motion to Dismiss; (2) granting Licensees' Emergency Motion for Injunction Pending Appeal; (3) staying the

U.S. District Court November 25, 1992 Order; and (4) expediting the appeal, ordered a detailed brief schedule, and set the matter for argument in San Francisco during the week of April 12 (see Appendix 2 to the Petition in Case No. 94-662).

On December 22, 1992, the City filed its Notice of Cross-Appeal to the U.S. Court of Appeals for the Ninth Circuit from the Trial Judgment entered on November 27, 1992.

On May 10, 1993, the Court of Appeals for the Ninth Circuit heard oral argument during which the Court stated to the City's counsel of record that it was not interested in hearing argument of the Eleventh Amendment jurisdictional issue, which was framed by Justice Kennedy's separate opinion in World Famous Drinking Emporium, Inc. v. City of Tempe, supra.

On November 2, 1993, the Court of Appeals filed an Opinion and certified the same for Publication under Circuit Rule 36-2, in which it reversed the Judge of the

United States District Court and held that the Court should have abstained under Huffman v. Pursue, Ltd., as contended by the City in its cross-appeal, but omitted any reference to the Eleventh Amendment "subject matter jurisdiction" issue. (See copy at Appendix 3 to the Petition for Writ of Certiorari in Case No. 94-662.)

The Court of Appeals further held in relation to attorney's fees that "The District Court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal." The Opinion contained the following conclusion:

> "Conclusion"
>
> "The decision of the district court refusing to abstain from exercising jurisdiction is reversed and the case is remanded to the district court with instructions to vacate its judgment and dismiss the complaint." (Our Emphasis.)

On November 30, 1993, Nevada Entertainment Industries, Inc. et al filed a petition for rehearing and suggestion that the Court rehear the matter en banc which

emphasized the fact that the Court's opinion did not hold that the federal court lacked subject matter jurisdiction. [The Petition for Rehearing introduced new contentions such as "consent" to federal jurisdiction. (See Appendix 4-10 through 4-17 to this Petition) and other contentions which are regularly advanced and considered in connection with the Wiener v. County of San Diego, 23 F.3d 263 (CA 9, 1994), interpretation of Huffman abstention but totally inconsistent with the Dubinka v. Judges of the Superior Court of the State of California, 23 F.3d 218 (CA 9, 1994), interpretation of Huffman abstention].

On January 18, 1994, the City of Henderson et al. filed their "Response to the Petition for Rehearing and Suggestion for Hearing en Banc." See copy at Appendix 4 to this Petition, at Appendix pages 4-10 through 4-17, where the City claimed that the Court of Appeals' failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issue was responsible for the confusion which regularly appears in Huffman abstention decisions. Compare

Dubinka, supra, with Wiener, supra. The City's Response (see Appendix pages 4-17) ended with the caveat that, notwithstanding these many new claims of Nevada Entertainment Inc., the Ninth Circuit was faced with a "bottom line" record fact on appeal; that is, that Assistant City Attorney Liza Conroy at the outset had objected to the Court's jurisdiciton under the Equity maxim of "clean hands." (See Appendix at page 4-17.)

On April 7, 1994, the Court of Appeals filed an order reading:

> "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9, 1993) is withdrawn."

See copy at Appendix 5 to the Petition for Writ of Certiorari herein.

On May 4, 1994, the Court of Appeals filed a Memorandum Opinion in which it noted in a footnote on page 1, that the Memorandum was not appropriate for publication and may not be cited to or by the court of the

circuit. Thereafter, the court reexamined the City's quasi-judicial proceedings and held that the district court's finding of deception by Nevada Entertainment Industries, Inc. et al., applied and was amply supported by the record and affirmed the district court's judgment on that basis, and dismissed the City's cross-appeal (i.e. that the civil rights complaint should have been dismissed for lack of "subject matter jurisdiction" under Younger v. Harris, 401 U.S. 37 (1971)) as moot. The Court made no ruling on the City's cross-appeal that the City was entitled to attorney fees. See copy of Memorandum decision at Appendix 6 to the Petition for Writ of Certiorari in in 94-662, and compare its earlier ruling on attorneys fee on November 2, 1993 at Appendix 3 to No. 94-662, at page 3-11.

On May 17, 1994, the Court of Appeals filed an order granting Nevada Entertainment Industries, Inc. et al.'s motion for extension of time until June 21, 1994 to file a petition for rehearing.

On May 18, 1994, the City of Henderson filed a Petition for Rehearing as to the Court of Appeals Memorandum of May 4, 1994. See copy at Appendix 7 to the Petition in Case No. 94-662.

On June 6, 1994, the City of Henderson filed a Petition for Writ of Mandamus (or Certiorari Under Rule 11) to the United States Court of Appeals for the Ninth Circuit in the United States Supreme Court, In re City of Henderson, a Nevada Municipal Corporation, James Goff, Chief of Police of the City of Henderson, v. Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop, No. 93-1969, in an attempt to require the Court of Appeals to explain why it had withdrawn its November 2, 1993 opinion which had upheld the cross-appeal by the City re Huffman abstention, and why it had failed, and neglected, and/or refused to apply the rules of law established by the United States Supreme Court, which that opinion held were controlling, as the law of the case on the

City's cross-appeal.

On June 14, 1994, the Court of Appeals denied the City of Henderson's Petition for Rehearing. See Appendix 8 to the Petition for Writ of Certiorari in Case No. 94-662.

On June 17, 1994, the City of Henderson moved for leave to file a second petition for rehearing (based upon newly decided authorities: Kokkonnen v. Guardian Life Ins. Co. of America, 54 CCH S.Ct. Bull., p. B1724, decided May 16, 1994). See copy of Second Petition for Rehearing at Appendix 9 in Case No. 94-662. On or about June 17, 1994, Nevada Entertainment Industries filed its Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

On June 17, 1994, the City of Henderson filed a Motion for Order Staying Mandate in the Court of Appeals for the 9th Circuit. See copy at Appendix 6 to the Supplemental Brief in Case No. 93-1969.

On July 11, 1994, the Court of Appeals denied the Petition for Rehearing of Nevada Entertainment and the City of Henderson's

motion for leave to file a second petition for rehearing. See Appendix 10 to the Petition in Case No. 94-662.

On July 25, 1994, the Court of Appeals granted Nevada Entertainment's motion to stay the mandate pursuant to Rule 41 (b). See Appendix 11 to the Petition in Case No. 94-662.

On August 12, 1994, the City of Henderson filed a Motion for Order Extending Stay of Mandate together with a supporting declaration and Joint Stipulation of the Parties and Memorandum of Points and Authorities with the Court of Appeals for the Ninth Circuit, and on August 24, 1994, the Court of Appeals granted the Parties Joint Motion for Order Extending Stay of Mandate. See Appendix 12 to the Petition for Writ of Certiorari in Case No. 94-662.

THE ELEVENTH AMENDMENT FORBIDS THE FILING OF NEVADA ENTERTAINMENT'S FEDERAL COMPLAINT.

Nevada Entertainment's civil right complaint is not what Nevada Entertainment's petition represents it to be: an "independent action in the federal court." See copy of the civil rights Complaint at Appendix A (Appendix 2 to Reply Brief). In fact and as a matter of law, it is an action brought by a citizen of Nevada in the federal court against the Sovereign State of Nevada, which the Eleventh Amendment forbids, which collaterally attacks an order of the City Council of Henderson for actions taken by it, acting as an agent for the Sovereign State of Nevada, in a pending quasi-judicial license revocation proceeding within the Nevada State Judicial System, seeking revocation of Nevada Entertainment's business license on the ground of fraud in connection with its application for a business license. As such, the filing of the Federal Civil Rights Complaint, this trial, and this appeal in the federal court is in direct

conflict with and violates the Eleventh Amendment to the Federal Constitution and, precludes the Federal Court from assuming subject matter jurisdiction under its Article III powers and hearing such cause. In Welch v. State Dept. of Highway and Public Transportation et. al., 483 U.S. 468, at 472; 97 L.Ed.2 389, at 395 Justice Powell writing the plurality opinion for 4 justices held:

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.:
>
> The Court has recognized that the significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bring suit against the citizen's own State in federal court.

> even though the express terms of the Amendment refer only to suits by citizens of another State. Hans v. Louisiana, 134 U.S. 1, 10, 33 L.Ed. 842, 10 S.Ct. 504 (1890). See Edelman v. Jordan, 415 U.S. 651, 662-663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973). For the same reason, the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.' Ex parte New York, No. 1, 256 U.S. 490, 497, 65 L.Ed. 1057, 41 S.Ct. 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 U.S. 503, 65 L.Ed. 1063, 41 S.Ct. 592 (1921) (Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes). See Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 683, n 17, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (plurality opinion of Stevens, J.); id., at 706-710, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (White, J., concurring in judgment in part and dissenting in part)."

See also the annotation "Supreme Court's Construction of Eleventh Amendment, Restricting Federal Judicial Power over suits against States' 106 L.Ed.2 660 at 677:

> "the following Supreme Court decisions have expressly recognized

that the Federal Constitution's Eleventh Amendment is not limited in its application to suits against a state as a named defendant, but rather that its application should be determined by the essential nature and effect of the suit in question: Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903; Re Ayers (1887) 123 US 443, 31 L.Ed. 216, 8 S Ct 164; Pennoyer v. McConnaughy (1891) 140 US 1, 35 L Ed 363, 11 S Ct 699; Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654; Ex parte New York (1921) 256 US 490, 65 L Ed 1057, 41 S Ct 588; Principality of Monaco v. Mississippi (1934) 292 US 313, 78 L Ed 1282, 54 S Ct 745; Worcester County Trust Co. v. Riley (1937) 302 US 292, 82 L Ed 268, 58 S Ct 185; and Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

It was observed by the Supreme Court in Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903, infra section 15[c], that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, and that the Eleventh Amendment is to be substantially applied in furtherance of its intention, and not evaded by technical and trivial subtleties.

The court in Re Ayers (1887) 123 US 433, 31 L Ed 216, 8 S Ct 164, infra section 15[b], also stating that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, added that such amendment's prohibition must be determined by a consideration

of the nature of the case as presented on the record.

In Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654, the Supreme Court recognized that looking through form to substance, the Eleventh Amendment applies not only where the state is actually named as a party defendant on the record, but also where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party.

In Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 71 Ohio Ops 2d 474, infra section 22, which involved a federal civil rights action against a state governor and other state officials, the Supreme Court stated that it was well established that the Eleventh Amendment barred suits against the state not only when it was the named party, but also when it was the party in fact. The court noted that the applicability of the Eleventh Amendment was to be determined not by the mere names of the titular parties, but by the essential nature and effect of the proceeding as it appeared from the entire record." (our emphasis).

The City of Henderson contends herein (Case No. 94-786) and in Case No. 94-662 as follows: [See] copy of the City's Reply Memorandum in Case No. 94-662 at Appendix A, p. 15 to this brief, reading:

"...Nevada Entertainment deliberately chose to collaterally

attack the quasi-judicial fact finding of 'fraud' made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding 'abstention' precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish 'standing' at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)"

RESPONDENTS' OBJECTIONS TO PETITIONERS QUESTIONS 1, 2 AND 3

Petitioner Nevada Entertainment is deliberately attempting to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copy of Reply Brief at Appendix A to this Brief (Appendix 4 to Reply Brief). The use of

this frivolous petition for writ of certiorari for that purpose is a further patent violation of the Eleventh Amendment. The Eleventh Amendment was specifically adopted by the States in 1792 to forbid the use of the federal court system as Nevada Entertainment has attempted to do in this Petition for Writ of Certiorari, and is the foundation for the Huffman Abstention doctrine which requires a dismissal of the federal complaint, for lack of subject matter jurisdiction. This "frivolous" petition is the direct result of the Ninth Circuit's determined refusal to apply the law of the land (Huffman Abstention). The duty of the Ninth Circuit was to "find" and "apply" the law; not to "find" and "defy" the law.

In the City of Las Vegas case supra; the Nevada Supreme Court specifically held, one year earlier, (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business

license by deception may not collaterally attack the City Council's "fraud" finding and obtain the judicial relief which Nevada Entertainment seeks in Questions 1-3 of its petition for Writ of Certiorari in 94-786 in the same quasi-judicial proceedings which the State has brought to revoke its license for fraud in its business application. The District Court of Nevada had ruled to the contrary (see Appendix A, Reply Brief at pages 4-7). The Nevada Supreme Court reversed the District Court on that issue. Had Nevada Entertainment filed its civil rights action in the State Court as a part of an appeal from the Quasi-Judicial Order of the City Council revoking their business license, as it was required to do under Nevada State law, Questions 1-3, which had been asked and answered in the City of Las Vegas ruling in the Nevada Supreme Court in 1989, would have been decided against Nevada Entertainment.

Question 1 as framed by Nevada Entertainment reads: "May a city violate the first and Fourteenth Amendment (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtained its business license by deception?" Question 3 reads: "To prove that a city utilizes an uncontitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 for the purpose of answering the above 3 questions, is frivolous as a matter of law because the federal courts below lack "subject matter jurisdiction", under the command of the Eleventh Amendment. "The

Judicial power of the United States shall not be construed to extend to any suit..."

STATEMENT OF THE CASE

The "stake" in this lawsuit is the sovereign, Eleventh Amendment right of the City of Henderson, acting as the agent for the State of Nevada, to enact by ordinance and apply the "conditional use" zoning principle and the States use of quasi-judicial proceedings to adult book stores in Henderson, Nevada, and to have such ordinances relating to the State's laws and license revocation procedure and the use of quasi-judicial proceedings, tested for the first time in the State of Nevada Courts under Watson v. Buck, 313 U.S. 387 (1941), not in the federal courts. This Court should place a focus on this principle and label it "Watson v. Buck Abstention." Further, it should also identify the fact that all such special abstention defenses ("Younger" "Huffman") are derived from the Eleventh Amendment commands. That claim (which initiated

this litigation) was made four years ago under the City's contention that a "conditional use" ordinance could be constitutionally applied in such a case, see 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1414 at page 1426-1429. See Case No. 90-1771, at pages 52-61. See also Case No. 92-643 at Point III on pages 46-57, copies of which are attached to this Brief at Appendix B to this Brief. That the City was "prudent" in its judgment that a Nevada state court (and not a federal trial court) should make that judgment under Watson v. Buck, see and compare the bizarre result (contradictory holdings) reached by two courts in the most recent United States District Court and United States Court of Appeals opinions in the Prince George's County case in 11126 Baltimore Blvd. v. Prince George's County, Md., 32 F.3d 109 (1994) (August 12, 1994)!!!

Respondent contends that the record on appeal in this litigation establishes "pure" "constitutional" error of great magnitude -- not merely "judicial" error. It is not a matter of "correcting" technical errors in cases of only local importance where the correction in no way promotes the development of the law." Anderson v. Haless, 459 U.S. 412 (1982) (Stevens,J., dissenting), and is not "concerned with the correction of errors in lower court decision" or other errors which do not attain the title and rank of "constitutional" error (see the text in Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, at Section 5.12, "Summary Disposition on the Merits," at page 251.) This is a real controversy which is deserving of a grant of writ of certiorari by this Court. It is universally recognized that "adult businesses" pose their own peculiar law enforcement problems. In that regard, see City of Henderson news articles at

Appendix C to this Brief. As the present time, the duplicate expense to State government in prosecuting such State sovereignty, Eleventh Amendment rights to conclusion in abstention cases in two court systems is substantial, (see Appendix D to this Brief, for example, showing the costs to the City of Henderson to date in asserting this Eleventh Amendment right). As further injury, the Ninth Circuit having ruled that "Huffman Abstention" controls, has withdrawn that decision rather than rule on the specific rule of law which has been the "focus" of the four years of litigation. Under the present practices, the "chance" of achieving a hearing on the merits and prevailing "cost-wise" in abstention litigation is routinely characterized as being on a par with "Russian roulette". It is for this latter reason that many abstention rulings, which should have been appealed, have not been appealed.

Nevada Entertainment's use of the

federal court to collaterally attack the quasi-judicial finding of fact of "fraud" by the City Council was intentional, and was designed to avoid confrontation in the State Court with the binding decision of the Nevada Supreme Court in City of Las Vegas v. Nevada Enterprises, (supra).

The procedural tactic Nevada Entertainment followed in the quasi-judicial proceeding in this case was identical to that employed by Pursue, Ltd. in the judicial proceeding involved in Huffman v. Pursue, Ltd. The only difference is that, in the Huffman case, Pursue, Ltd. obtained its "stay" from the federal district court; and in this Henderson case, Respondent first obtained the necessary "stay" from the City Council by mutual agreement to permit an appeal of the City Council's ruling; thereafter, Nevada Entertainment was able to continue that stay in force by virtue of the United States District Court's and Court of Appeals' injunctions.

Further, Nevada Entertainment subjectively must have known (through its attorneys who are "experts" in this area of the law and as a reasonable person) that its federal action was barred by the Eleventh Amendment and this Court's ruling in the Dayton case.

CONCLUSION

For all of the above reasons and others, given in Reply to the Response Brief of Nevada Entertainment in Case No. 94-662, and in this Response Brief to the Nevada Entertainment Petition in Case No. 94-786 and because the the Henderson trial facts and record on appeal parallel Huffman trial facts, as applied to the rule of law expressed in Dayton (which makes Huffman binding in quasi-judicial proceedings), Attorney Diamond's claim in his Response Brief in Case No. 94-662 of an "open question" is without support. Nevertheless, Petitions for Writs of Certiorari should be granted and both cases (Case No. 662 and Case No. 786)

consolidated and set for oral argument on the City of Henderson's claim of a right to reinstatement of the opinion and judgment which was reported on November 2, 1993, in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348, and relief for its Eleventh Amendment injury including its right to attorneys' fees under common law and statutory law and Rule 11 as the prevailing defendant under 42 U.S.C. Section 1988 in relation to the "focal" issue re the Eleventh Amendment in this four year litigation.

See Supplemental Brief in Case No. 94-662, being filed concurrently with this brief in Case No. 94-786 for additional reasons why a plenary review of these issues should be granted at this time.

DATED: December 1, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record
For Petitioners

APPENDIX A

REPLY BRIEF OF THE CITY OF HENDERSON IN CITY OF HENDERSON ET AL. V. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., ON A PETITION FOR WRIT OF CERTIORARI IN NO. 94-662.

[Reference: Respondents' Brief in Opposition at pp. 4, 39, and 44.]

BEST AVAILABLE COPY

No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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DOCKETED ON OCTOBER 11, 1994

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RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED.

At pp. 2 and 5 of the Response Brief filed on November 9, 1994, Nevada Entertainment Industries, Inc. et al. (hereinafter "Nevada Entertainment") has mischaracterized both the trial facts and the single legal issue which Nevada Entertainment has challenged. See p. 2, reading:

> "The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court having previously and expressly left open, should now resolve." (Our Emphasis.)

See page 5, reading:

> In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question." (Our Emphasis.)

In this Reply Brief, the City of Henderson submits that the excerpts of record on Nevada Entertainment's appeal and the City of Henderson's Cross-Appeal and the appellate records in this Court in

Case Nos. 90-1771, 92-643, and 93-1969 and at pages 7-29 of this Petition for Writ of Certiorari in Case No. 94-662, establish both as a historical fact and as a matter of law that the federal civil rights complaint which Respondent Nevada Entertainment, a citizen of the State of Nevada, filed in the U.S. District Court for the District of Nevada on April 24, 1990 directly interfered with the progress of the State of Nevada quasi-judicial (administrative) proceeding, which was then pending, and that said filing of a federal civil complaint of that nature, regarding a quasi-judicial matter which is properly before a Nevada tribunal, by a Nevada State citizen: (1) is forbidden by the Eleventh Amendment (i.e. the federal court lacks "subject matter jurisdiction"), and (2) was prohibited by this Court's landmark "abstention" decision in 1975 in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, and its more recent "binding" holding in 1986 in Ohio Civil Rights Commission v.

Dayton Christian Schools, Inc., 477 U.S. 619, at 629.

Nevada Entertainment's statement that the procedural historical facts in the trial court below are that: "Respondents filed their civil rights action after the decision of the City council became final" is an "egregious" misstatement of the trial record on appeal because: (1) an "abstract" statement of this nature, without reference to the record, is pointless; (2) it is true, both as a historical fact and as a matter of law, that the temporary restraining order and the preliminary injunction which were issued in Nevada Entertainment's federal civil rights action actually prevented the City Council's quasi-judicial order from becoming "final;" (3) it is true, both as a historical fact and as a matter of law that, from a procedural viewpoint the trial facts in this Petition cannot be distinguished from the trial facts in this Court's binding precedent in 1986, in Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, at 629 (1986), which extended the abstention doctrine expressed as to State judicial proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, to include quasi-judicial administrative proceedings; and (4) during the four years of litigation, three prior petitions on file in this Court have correctly stated and given notice that the record herein tracks the trial facts in Huffman, supra, which is binding upon the federal courts and Respondent has, nevertheless, recklessly continued to litigate. See "Statement of Facts" in No. 90-1971 at p. 22, 92-643 at pp. 5-12 and 19; 93-1969 at p. 15, and 94-662 herein, at pp. 4-36 generally, pp. 10-11 specifically.

II. STATEMENT OF THE CASE

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION.

At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief).

The concluding paragraph of the City Council's written order, dated April 16, 1990, which was served on Nevada Entertainment, read as follows (see Appellant's Excerpts Exhibit 1, pp. 2-3):

> "Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a/ FANTASY VIDEO PLUS, orders written notice of its decisions to licensees within five

(5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

[Signatures of Council]"

As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still "pending" up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day "stay" period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring "subject matter jurisdiction" on such

date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief.

The date ("April 24, 1990") is of paramount importance, because "the existence of federal 'subject matter jurisdiction' ordinarily depends on the facts as they exist when the complaint was filed in the U.S. District Court." See Lujan v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331, at fn. 4, emphasizing the above language and citing Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826, 104 L.Ed.2d 893, 109 S.Ct. 2718 (June 12, 1989) at 900; see also Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140, at 1143:

> "As a general rule, the proper point of reference for determining whether state proceedings are 'ongoing' is

the date the federal complaint is filed. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S.Ct. at 1529-30....See also Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceedings is pending when federal complaint is filed); Thomas v. Texas State Bd. of Medical Exam, 807 F.2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

"....

"The Younger line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. See, e.g., Younger, 401 U.S. at 44, 91 S.Ct. at 750; Huffman, 420 U.S. at 601-04, 95 S.Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that 'reflect[s] negatively upon the state court's ability to enforce constitutional principles.' Cf. Huffman, 420 U.S. 604, 95 S.Ct. at 1208; Steffel, 415 U.S. at 462, 94 S.Ct. at 1217."

A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have "subject matter jurisdiction" on April 24, 1990, must, of necessity, follow from the "command" of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that "command" in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387 (1941). See also Questions I-IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii. a copy of which is attached at Appendix 3 to this Brief. It follows therefrom that Nevada Entertainment used the power of the federal court in an unlawful (Eleventh Amendment violation) tortious and unconstitutional manner, through the issuance and

enforcement of an unlawful (Eleventh Amendment violation) tortious, unconstitutional federal court temporary restraining order (April 27, 1990) and an unlawful (Eleventh Amendment violation) tortious, and unconstitutional preliminary injunction (May 30, 1990) (See copy of Injunction Orders in Appellants' Excerpts of the Record at Exhibits 2 and 3), to: (1) extend the City Council's 10 day stay indefinitely, and (2) unlawfully, tortiously, and unconstitutionally prevent the City Council's quasi-judicial Order of April 16, 1990 from becoming a final enforceable order, which could be used to execute the will of the City Council acting as an agent for the Sovereign State of Nevada.

Petitioner City of Henderson contends that the "impasse" which such injunction order created was subjectively brought to the attention of U.S. District Court Judge Lloyd D. George in June of 1992 when he first attempted to force the City to trial in the federal Court against its will.

Prior thereto, the City had added defensive pleas of "Res Judicata" and "collateral estoppel" to its continuing plea of "lack of subject matter jurisdiction." At that time, Judge Lloyd D. George must have become aware of the Eleventh Amendment impasse which arose out of the City's Huffman abstention challenge; i.e. that the City Council's quasi-judicial order of revocation had been "stayed" by his injunction order, and had not become final and, therefore, such pleas of "res judicata" and "collateral estoppel," though pleaded, would not be available to the City as a defense in the federal trial; for, at that time, and, on his own motion, he reversed his initial ruling, suspended the trial procedure and, thereafter, certified the matter for an interlocutory appeal to the Ninth Circuit. See Statement of Facts in the Petition herein at pp. 22 and 23.

The "impasse" which was created by such federal injunction order was also

brought to Nevada Entertainment's attention after U.S. District Court Judge Lloyd George filed his final judgment on November 27, 1992 (see copy in Appellants Excerpts of Record, at Exhibit 7). At that time, Nevada Entertainment filed a petition for rehearing with the City Council, which must be interpreted as a recognition and judgment on its part that the matter was still "pending" before the City Council because the federal court's temporary restraining order and preliminary injunction order which it served on the City had indefinitely extended the stay which it had obtained from the City Council to allow it to take a "proper" appeal. However, the City Council could not act on the matter because the trial court's injunction, which U.S. District Court Judge Lloyd George had lifted, was immediately continued -- this time at the request of Nevada Entertainment and at the instance of the Ninth Circuit Court of Appeals -- and has not yet been lifted. The Parties

by stipulation, have stayed the mandate to await this Court's ruling on this matter, including the City's right to recover attorney's fees as a prevailing defendant under the Dayton Christian Schools case and 42 U.S.C. Section 1988, and damages under the injunction bond which the United States District Court set when the federal court's injunction was placed in effect. (See Statement of Facts in the Petition herein at p. 28).

The trial facts clearly establish that Nevada Entertainment's Attorney did not (as it might have done) wait until May 2, 1990 to file its federal lawsuit, on which date the City Council's 10 day stay order would have lapsed, and the City Council's revocation order would then have "become" final. Such a fact situation (not here present)[1] would have presented a

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[1] For an example of an attempt to state such a case (not here present), see (Footnote Continued)

different case and controversy and different federal questions as to whether, in such cases, a federal plaintiff could show, by extinsic evidence that the Huffman abstention doctrine did not apply because he was bringing a new and independent case in the U.S. District Court, and

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(Footnote Continued)
the petition for writ of certiorari in Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., No. 94-786 which was docketed on October 7, 1994, and served on the City of Henderson by mail on October 29, 1994. Because the petition herein establishes that the Eleventh Amendment does not permit Nevada Entertainment to file a federal lawsuit under the historical facts set forth herein in Case No. 94-662, the City of Henderson considers the filing of Case No. 94-786 to be a "frivolous" filing, and has addressed that issue in the Supplemental Brief which is being filed concurrently with the Reply Brief herein (case No. 94-662) and will further address that issue and Nevada Entertainment's untrue Statement in this Petition at p. 7, reading:

> "The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion."

in a Response Brief and Cross-Petition in Case No. 94-786. See, also, Statement of Facts in the petition herein in No. 94-662 at pages 38-39.

had abandoned the litigation in his state case, and was willing thereby to accept and suffer the potential risk of defeat under a "res judicata" and "collateral estoppel" defense.

Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the

City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish "standing" at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.

The duty of a Respondent to respond in a brief in opposition to a Petition for Writ of Certiorari is set forth in Rule 15.1 as follows:

> "Brief in Opposition.
> "...the brief in opposition should address any perceived misstatements of fact of law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted.... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition."

Further, Rule 16.1 provides that, after consideration of the papers, the Court may make a summary disposition of the merits. Because the record on appeal herein is clear that this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) is a binding precedent and controls the disposition of this case [which the Ninth Circuit so held in its first opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)], see Statement of Facts in the Petition herein at pp. 38-39, this Court is presently empowered to grant summary relief to

Petitioner without setting the issue for oral argument. See Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, Seventh Edition at pp. 250 et seq., "(c) Summary Disposition of the Merits by Per Curiam Opinion." Petitioner submits that such a disposition would not be proper in this case because of the preeminent importance of the City of Henderson's additional claims of: (1) Eleventh Amendment injury and (2) the federal court's lack of subject matter jurisdiction, both of which are of national interest to all of the states.

Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copies at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the

States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., Case No. 94-786. Further, there is a continuing problem in the Ninth Circuit and other Circuits, with the correct application of the test to be applied in ruling on Huffman abstention challenges, and a serious need for a comprehensive opinion of this Court to settle the present abstention problem and controversy in the Ninth Circuit; that is, the divergent views of the 38 individual Ninth Circuit Court judges, and a refusal of some: (1) to "recognize" the Eleventh Amendment foundation of the Huffman abstention challenge, and (2) to defer in proper cases to the sovereign right of state courts to rule on important State interests under the Eleventh Amendment. This issue is further addressed in a Supplemental Brief in Case No. 94-662 and in the City's

Cross-Petition to Nevada Entertainment in Case No. 94-786, concurrently being filed.

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.

Petitioner cannot envision a "riper" "test case" in which to examine the merits of the City's claim that the refusal to apply Huffman abstention doctrine is the direct cause of the City's Eleventh Amendment injury. The Statement of Facts clearly documents: (1) a refusal of the U.S. District Court and the Ninth Circuit Court of Appeals to apply the "binding" rule of law established by this Court in its Huffman and Dayton Christian Schools abstention decisions; (2) judgments of both Courts which contravene the State of Nevada's rights under the Eleventh Amendment; and (3) Eleventh Amendment constitutional injury to the City of Henderson and the State of Nevada which is patent on the face of the record.

Dated: November 26, 1994

James J. Clancy

APPENDIX 1

STATEMENT OF FACTS IN PETITIONER'S SUPPLEMENTAL BRIEF IN NO. 92-643, AT PAGES 4-12.

[Refer: pp. 5 & 15 of Reply Memorandum.]

Text at page 5 reads:

"At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief)."

Text at page 15 reads:

"Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

"Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)."

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much." (Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

APPENDIX 2

COPY OF FEDERAL COMPLAINT

[Reference: pages 6 and 7 of Reply Memorandum.]

Text at pages 6-7 reads:

"As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still 'pending' up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day 'stay' period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring 'subject matter jurisdiction' on such date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief."

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Santa Monica, CA 90405

(213) 399-3259

State Bar No. 40146

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs, vs. CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants.	CV No. CV-S-90-264-LDG-LRL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. FILED: APRIL 24, 1990

Plaintiffs, Nevada Entertainment Industries, Inc. and Daniel Bishop allege as follows:

1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983 in that this is an action by

Plaintiffs with regard to their attempt to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution; they are seeking to enjoin the Defendants from closing their constitutionally protected business.

2. Venue lies in the Southern Division of the District of Nevada; the City of Henderson is located in Clark County, Nevada, which is within the jurisdiction of the Southern Division.

3. Plaintiff Nevada Entertainment Industries, Inc., is, and at all times mentioned herein, was a corporation duly authorized and created by the laws of the State of Nevada. Plaintiff Daniel Bishop at all times mentioned herein, was and is the President of Nevada Entertainment Industries, Inc. and would be subject to criminal sanctions should Defendants not be enjoined from closing the subject business.

4. Defendant City of Henderson was and is, at all times mentioned herein, a

municipal corporation duly created by the laws of the State of Nevada and was and is located within Clark County and the Southern Division of the District of Nevada.

5. Defendant James Goff is sued in his official capacity as Chief of Police of the City of Henderson.

6. This action relates to the attempt by Plaintiffs to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution. The business is known is Fantasy Video Plus and is located at 1100 North Boulder Highway, Henderson, Nevada.

7. Defendants contend that the business in question (Fantasy Video Plus), is an adult business within the meaning of Henderson Municipal Code §19.16.006(B). For the purpose of this lawsuit, Plaintiffs will concede that the subject business, Fantasy Video Plus, is an adult business within the meaning of §19.16.006(B) of the Henderson Municipal Code.

8. On February 17, 1989, Plaintiffs

desired to commence a business in the City of Henderson wherein books, magazines and novelties would be sold and motion picture films (video tapes) could be sold and/or rented and exhibited. Plaintiffs desired, with respect to such business, to sell, rent, and exhibit materials protected by the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs located a parcel of property at 1100 North Boulder Highway, Henderson, Nevada. On February 17, 1989, Plaintiffs entered into a five year lease for the premises at 1100 North Boulder Highway, Henderson, Nevada 89015. The premises consisted of a structure with 3,200 square feet of floor area. The lease would commence on April 1, 1989 and last until April 1, 1994.

10. At the time the lease was made, the City of Henderson had already enacted (May 1983), Chapter 4.102 of the Henderson Municipal Code regarding "video rental stores."

11. Henderson Municipal Code §4.102.020 required all "video rental stores" (defined as establishments which derived its gross profits from the sale or rental of sexually explicit movies, films or tapes) to certify that no such films would be sold or leased to persons under the age of 21.

12. With the exception of Chapter 4.102, Defendant City of Henderson did not further regulate premises selling or renting "adult films."

13. It was the intention of Plaintiffs to exhibit, sell, and/or rent the kinds of materials described in Chapter 4.102 of the Henderson Municipal Code (video rental stores).

14. The general requirements for obtaining a business license were set forth in Title 4 of the Henderson Municipal Code entitled "Business Regulations and License."

15. On March 7, 1989, after Plaintiffs executed their lease on February 17, 1989, Defendant City of Henderson adopted

Ordinance No. 1112 which repealed in its entirety former Chapter 4.04 entitled "Business Regulations and Licenses" and which replaced it with a new Chapter 4.04 entitled "Business Regulations and Licenses."

16. Accordingly, since the adoption of Ordinance No. 1112 on March 7, 1989, Defendant City of Henderson has been regulating businesses and has been determining whether or not to issue business licenses based upon the provisions of the new Chapter 4.04 which was adopted by Ordinance No. 1112.

17. By virtue of Henderson Municipal Code §4.04.020, all businesses in the City of Henderson must have a license issued by the City of Henderson.

18. Henderson Municipal Code §4.04.020 provides as follows:

> "(a) It shall be unlawful for any person to commence, carry on, engage in or continue in the City any business without first

obtaining a license and paying the appropriate license tax as provided by terms and provisions of this Title.

(b) A license shall only be issued if the applicant has a fixed place of business from which the business will be conducted, unless the Title specifically states otherwise. Once issued a license, the licensee shall not engage in business from any other premises other than the one for which the license was issued.

(c) No licensee shall allow another person to display a license on the licensee's premises, or to in any way allow any other person to use the licensee's premises to conduct business unless expressly permitted by the Division.

(d) Upon the filing of a

complete and accurate business license application and the payment of all required license fees, the applicant may be issued a temporary business license by the Division; provided, however, that the requirements of all appropriate federal, state, and county regulatory agencies have been met; and that the requirements of all Departments or Divisions of the City have been meet and properly approved. The temporary business license shall permit the applicant to engage in the business designated at the location so stated for a period of up to, but not to exceed sixty (60) days, within which all inspections and requirements imposed upon the applicant by the various Departments or Divisions of the City are to be complied with.

Upon the recommendation by the various Departments or Divisions within the City, the Division shall have the discretion to extend a temporary business license for a period of an additional sixty (60) days. It shall be the sole responsibility of the applicant to schedule all follow-up inspections necessary to comply with all the requirements and corrections. Should the applicant have not met the requirements as set forth by the Departments or Divisions of the City within the maximum prescribed time limit of one hundred twenty (120) days, the temporary license shall be deemed expired. Continued operation of the business shall constitute a violation of this Title, and the business shall be subject to legal action as prescribed by

this Title, the penalties for which are described in Section 4.04.230.

(e) The above stated provisions for a temporary business license shall be in addition to those provisions applying to privileged business licenses or any business which requires formal approval by the Council, unless the Director has first given tentative approval in accordance with section 4.04.170.

19. Henderson Municipal Code Section 4.04.150 sets forth the grounds for denial, non renewal, suspension, limitation and revocation of licenses. Specifically, Section 4.04.150 provides as follows:

"It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of

this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this title.

(a) Any license or permit application made pursuant to the provisions of this title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information required by this Title;

(2) All license and investigation fees are not paid;

(3) False or fraudulent statements

in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) The applicant, or any of its principals, do not qualify for, or have not obtained work card identification as may be required by the Division;

(6) A finding by the Division or by the Council that said business will not comport with the peace, health, safety, convenience, good

morals, or the general welfare of the public; (7) Lack of fitness of the applicant to engage in the particular occupation of business. For the purpose of this section, lack of fitness shall be defined as that quality or character of the license applicant which tends to establish that the applicant will not perform the services to be provided under his license or permit in a reasonable manner to the public. Particular factors to be taken into consideration by the Division or by the Council in determining whether the applicant

is unfit, are whether the applicant has a bad moral character, has intemperate habits or a bad reputation for truth, honesty, or integrity, or has a prior criminal conviction and/or a prior license denial, suspension, limitation or revocation, either locally or in another state or community, to the extent that it is possible that the acts which formed the basis of the conviction, denial, suspension, limitation, or revocation may be committed by the applicant under the license or permit being

applied for. In the event the applicant is a company, partnership, association, corporation, or other business entity, the Division or the Council may consider the fitness of each of the applicant's owners, partners or directors.

(8) For any other cause by the City through its Division or Council to be a just or equitable reason.

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be limited to

the following:

(1) The conduct of the business in an unlawful, improper, or irregular manner;

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) The existence of unsanitary conditions at, near, or in the premises which causes or tends to create a public nuisance or which injuriously

affects the public health, safety or general welfare;

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) The commission of, or permitting or causing the commission of any act in the operation of the business which act is made unlawful or is prohibited by any ordinance of the City, county, state or federal government;

(7) For any other cause by the City through its Division or its Council to be a just or equitable reason.

(c) All business licenses issued under this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable."

20. Henderson Municipal Code §4.04.200

authorizes certain Henderson officials to enforce the ordinance by citations and arrests. Those with enforcement powers include police officers as well as the Director of Licensing and his agents.

21. Henderson Municipal Code §4.04.220 provides that the violation of any provision of the Code is a misdemeanor.

22. Shortly after Defendant City of Henderson adopted Ordinance No. 1112, portions of which are quoted above, the City of Henderson also adopted Ordinance No. 1120, which enacted Titles 18 and 19 of the Henderson Municipal Code. Ordinance No. 1120 was a comprehensive revision of the Zoning Code and zoning law of the City of Henderson. On April 4, 1989, by Ordinance No. 1120, Defendant City of Henderson repealed its prior ordinances regarding zoning, and, as stated, replaced them with a new comprehensive "Development Code." Said Development Code purported to regulate zoning in the City of Henderson and still purports to regulate zoning in the City of

Henderson.

23. Prior to April 4, 1989, it was lawful for Plaintiffs to operate their proposed business at the property leased by them on February 17, 1989. That is, the property was commercial in nature and permitted the establishment of the business intended to be operated by Plaintiffs.

24. At the time Plaintiffs leased their property for the business in question, their property was zoned commercial (CC).

25. However, after the adoption of Ordinance No. 1120 on April 4, 1989, the City of Henderson purported to regulate where "adult businesses" could be located in the City of Henderson. That is, the effect of Ordinance No. 1120 adopted April 4, 1989, was to prevent Plaintiffs from commencing the business they intended to commence when they first leased the property on February 17, 1989.

26. Ordinance No. 1120 purported to allow adult businesses to exist only in one zone of the City of Henderson, the newly

created "CH" zone.

27. Section 19.16.006(B) of the Henderson Municipal Code provides as follows (Ordinance No. 1120):

> "Adult Businesses. Establishments based primarily on materials or performances that depict, describe, or relate to "specified sexual activities", as defined in Chapter 19.12."

28. Section 19.12.006(DE) of the Henderson Municipal Code provides as follows:

> "Sexual Activities, Specified: Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, oral copulation, or sodomy; fondling or other erotic touching of human genitals (pubic region) buttocks, or female breasts."

29. Section 19.24.002 of the Henderson Municipal Code specifies the following with

respect to the "CH" Highway commercial district zone":

> "To provide sites for the auto-oriented commercial uses, including hotels, motels, service station, car washes, automobile sales and services, drive in restaurants, offices, limited warehousing and commercial services."

30. By virtue of Henderson Municipal Code §19.24.004, adult businesses, including bookstore and motion picture arcades, were and are only permitted in the "CH" zone and, within such zone, allowed only "with use permit, subject to location requirements set forth in Henderson Municipal Code Licensing Regulations."

31. After Defendant City of Henderson adopted its revised zoning law on April 4, 1989, no parcel of property in the City of Henderson was zoned "CH." Thus, nowhere in the City of Henderson could one lawfully operate an adult business, such as an adult

bookstore and arcade. Although the City of Henderson adopted the zoning provisions quoted above on April 4, 1989, the City did not establish any zone known as the CH zone. Thus, after April 4, 1989, the City of Henderson effectively prohibited adult bookstores and arcades from operating anywhere within the City of Henderson, in violation of the First and Fourteenth Amendments to the United States Constitution (Schad v. Borough of Mount Ephraim, 452 U.S. 61 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

32. Since the City of Henderson after April 4, 1989 effectively banned throughout its territory all adult bookstores and arcades by zoning ordinance, the zoning ordinance was a nullity, being unconstitutional on its face. In effect, the City of Henderson by violating the principles set forth by the United States Supreme Court in Schad v. Borough of Mount Ephraim, supra, had no zoning law regarding adult bookstores

and motion picture arcades.

33. Although, as stated above, Defendant City of Henderson totally prohibited adult bookstores and arcades from operating anywhere in the City of Henderson, in violation of the First and Fourteenth Amendments to he United States Constitution, Defendant City of Henderson also required that any such business obtain both a business license and a conditional use permit.

34. One may not obtain and/or retain a business license from Defendant City of Henderson if one's business is not zoned properly or if it does not have a required conditional use permit.

35. In addition to needing a business license as set forth above, Plaintiffs also needed a conditional use permit pursuant to Section 19.74.012 of the Henderson Municipal Code.

36. In order to obtain a conditional use permit, Plaintiffs would have to establish and the City Council would have to

find, among other things,

"That the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the Comprehensive Plan; will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City. . . ."

37. As stated above, after April 4, 1989, the City of Henderson was maintaining and did maintain an unconstitutional system with respect to adult bookstores and motion picture arcades in that, among other things, there was no property zoned CH and therefore no property on which such a business could be operated; in addition, even if there were such properties zoned CH, such business

would have to obtain a business license under the standards set forth above and also obtain a conditional use permit under the standards set forth above, such standards being unconstitutionally vague and unenforceable.

38. On August 31, 1989, Plaintiffs duly filed their application for business license. At the time Plaintiffs applied for their business license, they were informed by an official of the City of Henderson that there was no place in the City of Henderson were one could lawfully operate an adult bookstore and motion picture arcade. Therefore, if their application described the business as an adult business, Defendant City of Henderson would be compelled to deny the application.

39. On August 31, 1989, Plaintiffs submitted a written application on a form provided by the City of Henderson. Under the heading "General Information", Plaintiffs provided the following statement "Nevada Entertainment Industries dba Fantasy

Video Plus."

40. Under the heading "Occupancy Use Information" (type of business), Plaintiffs provided the following description:

"Mass media books and video store; novelty shop, etc."

41. On September 21, 1989, Defendant City of Henderson issued a revenue business license to Plaintiffs.

42. On or about December 5, 1989, Defendant City of Henderson re-zoned Plaintiffs' property at 1100 Boulder Highway, Henderson, NV from CC to CH. By rezoning Plaintiffs' property from CC to CH, Defendant City of Henderson determined that an adult bookstore and arcade could theoretically be operated at said location, thereby ostensibly eliminating one ground for invalidating the regulatory scheme for adult bookstores and arcades; that is, as of December 5, 1989, Defendant City of Henderson no longer purported to totally ban adult bookstores and arcades from the City of Henderson (thereby purporting to comply

with Schad v.Borough of Mount Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

43. However, although Defendant City of Henderson re-zoned Plaintiffs' property from CC to CH, Defendant City of Henderson still required a business license and a conditional use permit for the operation of an adult bookstore and motion picture arcade.

44. Defendant City of Henderson does not want any adult bookstores or motion picture arcades to be located anywhere within its territorial jurisdiction, but also does not want any court to invalidate its regulatory scheme. As a result, Defendant City of Henderson wants to create the impression that it allows such businesses when in fact it does not and does not want them.

45. On February 1, 1990, Plaintiffs opened their business and were immediately inspected by Defendant City of Henderson.

46. Defendant City of Henderson

concluded that Plaintiffs opened an adult bookstore and arcade. Because Defendant City of Henderson did not want such a business to operate anywhere within its City limits, Defendant City of Henderson took two actions to close Plaintiff's business. It introduced and, on March 13, 1990, adopted ordinance No. 1160, purporting to regulate "sexually oriented business."

47. Ordinance No. 1160 amended Title 4 of the Henderson Municipal Code by establishing Chapter 4.110. In essence, newly adopted Chapter 4.110, requires adult businesses (including Plaintiffs' business) to obtain a license; however, it would preclude a business such as Plaintiff's business from operating within 1000 feet of a place where alcoholic liquor is sold. Plaintiffs' business is within 1000 feet of a place where alcoholic liquor is sold but the ordinance creates a non conforming us for those businesses operating lawfully on March 15, 1990 (for a period of six months). Accordingly, while the adoption of Ordinance

No. 1160 reveals the obvious intent by the Defendant City of Henderson to shut down Plaintiffs' business, arguably Ordinance No.1160 has not yet affected Plaintiffs' business. There are other remedies provided by Ordinance No. 1160, and therefore the specific provisions of Ordinance No. 1160 will not be further discussed. Plaintiffs are not sure how the distance restriction will be determined and measured.

48. In addition to adopting Ordinance No. 1160, Defendant City of Henderson on March 13, 1990 initiated a proceeding to revoke Plaintiffs' business license.

49. Although Plaintiffs believe and still believe and contend that the ordinances of the City of Henderson purporting to regulate adult bookstores and arcades are facially invalid, out of an abundance of caution Plaintiffs decided to participate in an administrative proceeding provided by Defendant City of Henderson with respect to the revocation issue. The revocation hearing was conducted by the City

Council of the City of Henderson on April 10, 1990. After conducting the hearing, Defendant City of Henderson voted to revoke Plaintiffs' business license. At said hearing, Plaintiffs contended, unsuccessfully, that the regulatory scheme and the ordinances quoted above violated plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs objected to the revocation of their business license. The decision to revoke the license was arbitrary, invalid, and based upon incompetent and irrelevant evidence, and based upon an invalid ordinance. Plaintiffs made no material misrepresentations on their application. Had the information been presented which Defendant City of Henderson purportedly requested, it would not have been material to any valid criteria for granting or denying the license.

50. After the hearing conducted on April 10, 1990, Defendant City of Henderson purported to revoke Plaintiffs' business

license. A copy of the Decision and Order revoking the business license on April 16, 1990 is attached hereto as Exhibit 1.

51. The decision of April 16, 1990 takes effect on or about May 1, 1990.

52. Thus, as of May 1, 1990, unless this Court restrains the revocation or restrains enforcement of the ordinance, Plaintiffs will have to shut down their business. Plaintiffs contend that the business license ordinance and the conditional use permit ordinance are unconstitutional facially. Accordingly, it is probably not necessary for Plaintiffs to retain their business license. Instead, Plaintiffs have standing to challenge the facial validity of said ordinances.

53. Although unnecessary, Plaintiffs did exhaust available administrative remedies before the Henderson City Council.

54. Defendant James Goff was and is the Chief of Police of the City of Henderson. If Plaintiffs do not have a business license and/or conditional use

permit, Defendant James Goff, Chief of Police of the City of Henderson, will arrest, and/or cite Plaintiffs and their employees, in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs, accordingly, will be forced to close their business protected by the First and Fourteenth Amendments to the United States Constitution, unless this Court grants equitable relief as requested herein.

55. In addition to the Chief of Police, the Henderson Municipal Code also authorizes other City of Henderson officials to arrest and/or cite Plaintiffs. This would include the Director of Licensing, and agent and employee of Defendant City of Henderson.

56. Plaintiffs are without a legal remedy in the ordinary course of law. The threat of criminal enforcement of the Henderson Municipal Code against Plaintiffs by Defendants, is and will have a chilling affect on their First and Fourteenth

Amendment rights. They will be forced to close their business unless this Court grants a temporary restraining order, preliminary injunction, and permanent injunction.

57. Defendant City of Henderson has been since April 4, 1989, and still is, enforcing an unconstitutional regulatory scheme designed to preclude the operation of adult bookstores and motion picture arcades.

58. Plaintiffs business is located in the appropriate zone. If, in fact, it will become unlawful by virtue of Ordinance No. 1160 in six months, which Plaintiffs do not concede, then Defendant City of Henderson will also have unduly restricted the available locations wherein an adult business can be located, also in violation of the First and Fourteenth Amendments to the United States Constitution, but this particular challenge may be premature. If not, Plaintiffs are also attacking the constitutionality of Ordinance No. 1160 in this proceeding to the extent Defendants,

and each of them, attempt to enforce it.

59. Plaintiffs have been forced to retain an attorney to represent them in thisproceeding. If successful, Plaintiffs will pray for an award of attorney's fees pursuant to Title 28, United States Code, Section 1988.

60. A dispute has arisen among the parties with regard to the constitutionality of Ordinance Nos. 1112, 1120, and 1160 of the City of Henderson and actions taken by Defendant City of Henderson and threatened by Defendant City of Henderson and its Chief of Police. Accordingly, it is appropriate for this Court to render a declaratory judgment considering the constitutionality of various provisions and threatened actions and revocation proceedings of Defendants.

61. Unless this Court grants immediate relief, Plaintiffs will suffer irreparable injury in that they will be forced to close their business and be precluded from selling, renting, and exhibiting motion picture films, video tapes, and books and

magazines protected by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PLAINTIFFS PRAY FOR JUDGMENT AS FOLLOWS:

1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining Defendants, and each of them, from attempting to or from enforcing ordinances against Plaintiffs which would cause them to close their business at 1100 Boulder Highway, Henderson, NV;

2. For a temporary restraining order, preliminary injunction, permanent injunction, restraining Defendants and each of them, from revoking or enforcing the revocation of Plaintiffs' business license;

3. For declaratory judgment that Plaintiffs have the right to continue operating their business, as currently constituted, at 1100 Boulder Highway in Henderson, Nevada;

4. For declaratory judgment that

Defendant City of Henderson may not enforce its ordinances against Plaintiff's business at 1100 Boulder Highway, Henderson, Nevada;

5. For attorney's fees according to proof;

6. For such other and further relief as the court deems just and proper.

DATED: April 23, 1990

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Plaintiff

AFFIDAVIT OF DANIEL BISHOP

State of Nevada)
) SS
County of Clark)

Daniel Bishop, first being duly sworn, deposes and says:

1. I am the President of Nevada Entertainment Industries, Inc. and am also co-Plaintiff in this action. I have read the foregoing Complaint and the facts stated therein are true and correct to the best of my knowledge. If called upon as a witness, I could competently testify to such facts and I will be available for cross-examination by Defendants' counsel at the hearing on the request for temporary restraining order and at the hearing on the request for preliminary injunction.

_____

DANIEL BISHOP

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK,

STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	)	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to operate as an adult video business, the

licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately

to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issues at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of

the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAFEN

_____
CARLTON LAWRENCE

_____
DOROTHY VODENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

COPY OF QUESTIONS I & 1V IN PETITION FOR WRIT OF CERTIORARI IN NO. 92-643, AT pp. i-iii.

[Refer: page 9 of Reply Memorandum.]

Text at page 9 reads:

"A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have 'subject matter jurisdiction' on April 24, 1990, must, of necessity, follow from the 'command' of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that 'command' in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387(1941). See also Questions I & IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii, a copy of which is attached at Appendix 3 to this Brief."

Question I reads: "Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. Dist. Court has not found the "extraordinary circumstances" which the 11th Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie?"

Question IV reads: "Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Sec.1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

I

Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. District Court has not found the "extraordinary circumstances" which the Eleventh Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie.

II

Whether under University of Tennessee v. Elliott, 478 U.S. 788 (1986), the U.S.

District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system.

III

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial

finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2.

IV

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

APPENDIX 4

COPY OF CITY OF LAS VEGAS V. NEVADA INDUSTRIES, INC., 772 P.2d 1275 (NEV. 1989).

[Reference: page 18 of Reply Memorandum.]

Text at page 18 reads:

"Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copy at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., No. 94-786."

[CONTENTION: The City of Las Vegas case, supra, specifically held one year earlier (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business license by deception may not obtain the judicial relief Nevada Entertainment seeks (in Questions 1-3 of its Petition for Writ of Certiorari in 94-786) in the quasi-judicial proceedings which are brought by the State to revoke its license for fraud in its business application.]

Question 1 reads: "May a city violate the first and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtianed its business license by deception?" Question 3 reads: "To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 is frivolous because the federal court below lacked subject matter jurisdiction under the 11th Amendment violation.

SUPREME COURT OF

NEVADA

CITY OF LAS VEGAS, Nevada, Appellant, v. NEVADA INDUSTRIES, INC., a Nevada Corporation, Respondent.	CASE NO. 18491 OPINION. DATED: April 25, 1989

Business challenged city's revocation of its business licenses. The Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., issued permanent injunction and writ of mandamus prohibiting enforcement of business license ordinances against business, and city appealed. The Supreme Court, Young, C.J., held that: (1) misrepresentation in license applications that business was not sexually oriented justified revocation of licenses, and (2) ordinance provision serving as basis for imposition of fine against business was invalid.

Affirmed in part and reversed in part.

1. Licenses:

Falsely representing on applications for business licenses that business was not sexually oriented justified city's revocation of business licenses pursuant to municipal code, irrespective of any First Amendment interests. U.S.C.A. Const.Amend. 1.

2. Municipal Corporations:

While municipalities generally enjoy power to enforce their ordinances using fines, such ordinances must fix valid maximum penalty.

3. Municipal Corporations:

Standardless ordinance invites discriminatory enforcement.

4. Licenses:

Municipal Code provision authorizing imposition of penalty upon business, determined to have misrepresented its status as sexually

oriented business in application for business licenses, was invalid, as it vested city officials with unlimited discretion to establish fines and posed great risk of excessive fines. Const. Art. 1, §6.

5. Licenses:

Municipal Corporations:

Portions of penalty provision of municipal business license ordinances determined to be invalid for failing to establish valid maximum fine could be severed without defeating objectives of ordinance and, therefore, validity of remaining portions of ordinance would be sustained. Const. Art. 1, §6.

George F. Ogilvie, City Atty., Robert Yeargin and Val Steed, Deputy City Attys., Las Vegas, for appellant.

Alan B. Andrews, Las Vegas, For respondent.

OPINION

YOUNG, Chief Justice.

This action arose out of the appellant Las Vegas City Council's (Las Vegas) decision to revoke respondent Nevada Industries' business licenses. Nevada Industries operates a lounge facility with a jacuzzi and meeting rooms. A detective observed nudity and the exposure and touching of female breasts during a visit to the facility.

After an investigation and a hearing, Las Vegas revoked the business licenses because it found that Nevada Industries is a sexually oriented business, i.e. a "nude show." Consequently, it found that respondent made a misrepresentation on its application for business licenses by stating that it would not operate a sexually oriented business.[1] Moreover, Las Vegas found that Nevada Industries violated a Las Vegas zoning ordinance prohibiting the establishment of a sexually oriented business within one thousand feet of another sexually oriented business, church, school, park or playground.[2] Las Vegas also found

that Nevada Industries violated ordinances concerning the keeping of business records and failed to properly maintain its State Industrial Insurance System (SIIS) coverage. Pursuant to these findings, Las Vegas revoked Nevada Industries' business licenses and fined respondent $50,000.[3]

On Nevada Industries' motion, the district court issued a writ of mandamus and reviewed Las Vegas' actions. The district court concluded that Nevada Industries' activities enjoyed First Amendment protection because Las Vegas sought to regulate them as a "nude show." The court found the applicable ordinances unconstitutional as applied to this protected activity, and issued a permanent injunction and a writ of mandamus prohibiting their enforcement against Nevada Industries. Las Vegas appeals from the district court's judgment.

[1] Las Vegas' finding that Nevada Industries' activities constituted a nude show provided the basis for its conclusion

that Nevada Industries made misrepresentations on its application for a business license, and for its finding that Nevada Industries violated Las Vegas' zoning ordinance by operating within one thousand feet of another sexually oriented business. LVMC §19.74.020(I) addresses sexually oriented businesses, and defines "nude show" as "any establishment which provides or permits sexual conduct or the display of specified anatomical areas upon its premises as entertainment or as an attraction for business." The provision also defines adult motion picture theaters, adult bookstores, and similar establishments as sexually oriented businesses. Las Vegas correctly points out that the sucking of a woman's breast by a man, as observed by one of its detectives, constitutes "sexual conduct" under LVMC §19.74.010(A)(1) as do other actions which the detective observed.

Nevada Industries' facilities and advertising support the conclusion that it intended to operate in its present manner

(i.e. as a sexually oriented business) at the time it applied for its business license. Therefore, the record demonstrates that Nevada Industries falsely represented on its license application that it was not a sexually oriented business.

Consequently, we conclude that we need not address the issue of whether Nevada Industries' activities enjoy First Amendment protection because respondent's affirmative misrepresentation formed the basis for the revocation of its licenses. Accordingly, without addressing the First Amendment issues raised by respondent, we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business licenses pursuant to the Las Vegas Municipal Code.

Because Las Vegas determined that Nevada Industries' operation included a "nude show," the district court held that this case must turn upon First Amendment principles. According to the United States Supreme Court, under some circumstances,

nude dancing might be entitled to First and Fourteenth Amendment protection. California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972). Thus, the district court concluded that Las Vegas' licensing procedures must meed the strict constitutional standards imposed on all statutes which impinge upon First Amendment rights. We disagree.

Las Vegas characterized the entertainment provided by Nevada Industries as "nude show" in order to demonstrate that respondent made misrepresentations on its business license applications. Las Vegas revoked Nevada Industries' business licenses not because of the forms of expression which occurred at their operations, but for the simple reason that respondent perpetrated a fraud upon Las Vegas. Therefore, Nevada Industries' First Amendment rights are not dispositive of this case.

We note that under our decision in this case, Nevada Industries remains free to reapply for new business licenses. However,

should they continue to operate as a sexually oriented business, Las Vegas Municipal Code section 19.74.030 provides a basis for denying their licenses.

Accordingly, we reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business licenses. However, we affirm the district court insofar as it enjoined the imposition of Las Vegas' $50,000 fine upon respondent.

[2-5] According to Las Vegas Municipal Code section 6.88.120, after a hearing on a dispute, the board of commissioners shall render a decision on the merits, including "the penalty to be imposed, if any." After concluding that Nevada Industries violated Las Vegas' business licensing ordinances, the board of commissioners fined respondents $50,000.

Generally, municipalities enjoy the power to enforce their ordinances using fines. Commonwealth v. Cabell, 199

Pa.Super. 513, 185 A.2d 611, 616 (1962). However, the ordinance must fix a valid maximum penalty. Verona v. Shalit, 96 N.J.Super. 20, 232 A.2d 431, 433 (App.Div.1967). Because the penalty provision of section 6.88.120 fails to provide any limitation on the fines imposed, that clause is void. Id.

Municipal ordinances must not be oppressive. Hunter v. City of Atlanta, 212 Ga. 179, 91 S.E.2d 338, 340 (1956). In its present form, section 66.88.120 is invalid because it vests Las Vegas officials with unlimited discretion to establish fines. A standardless ordinance invites discriminatory enforcement. Baer v. City of Wauwatosa, 716 F.2d 1117, 1124 (7th Cir.1983). Because of the great risk of excessive fines resulting from enforcement of the penalty provision, it cannot stand.[4] Nev. Const. art. 1, §6.

When invalid provisions of a municipal ordinance are severable without defeating the objectives of the ordinance, we sustain

and give effect to valid portions of the ordinance.[5] City of Portland v. Dollarhide, 71 Or.App. 289, 692 P.2d 162, 167 (1984). Accordingly, we sustain the validity of the remaining portions of section 6.88.120.

Therefore, we affirm the judgment of the district court insofar as it enjoins the imposition of Las Vegas' fine on Nevada Industries, and reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business license.[6]

STEFFEN, SPRINGER and MOWBRAY, JJ., concur.

1/ Las Vegas Municipal Code §6.02.330 provides in part:

> 6.02.330 **Disciplinary action-Good cause designated.** The licensee may be subject to disciplinary action by the Board of Commissioners for good cause, which may include, but is not limited to:
>
> (A) The application is incomplete or contains false, misleading or fraudulent statements with respect to any information required in the application;

(B) The licensee or any of its principals fails to satisfy any qualification or requirement imposed by this Code, or other local, State or Federal Law or regulation pertaining to the particular license or approval for suitability sought or held;

. . . .

(F) The licensee or any of its principals has committed acts which would constitute a crime involving moral turpitude, or involving any Federal, State or local law or regulation relating to the same or a similar business;

(G) When substantial information exists which tends to show that the licensee or any of its principals is dishonest or corrupt;

. . . .

(I) The actual business activity constitutes a public or private nuisance, or will be or is conducted in an unlawful, illegal or improper manner;

. . . .

2/ In Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court upheld the constitutionality of a zoning ordinance similar to that implemented by Las Vegas in this case. The Court noted that the mere fact that commercial exploitation of material arguably protected by the First Amendment is subject to zoning and other licensing criteria is an insufficient reason for invalidating these ordinances. Id. at 62, 96 S.Ct. at 2448. Moreover, we must give great respect to Las Vegas' interest in preserving the quality of urban life and to

2/ Cont.
its need to experiment with solutions to difficult problems. Id. at 71, 96 S.Ct. at 2452-53. Thus, we find that the zoning ordinance implicated in this case is constitutional.

3/ The City imposed the fine pursuant to Las Vegas Municipal Code §6.88.120 which provides that:

> 6.88.120 Decision by Board. After the hearing of a contested matter, the Board of Commissioners shall render a decision on the merits which shall include findings of fact and conclusions of law and the penalty to be imposed, if any, and shall thereafter make and enter its order in its minutes in conformity to such decision. The decision of the Board shall be served on the parties personally or shall be sent to them by registered or certified mail. The decision shall become and remain effective upon such service unless the Board shall otherwise order.

4/ According to NRS 193.170, whenever a statute prohibits the performance of any act but fails to impose a penalty for the violation thereof, commission of the act shall be a misdemeanor.

5/ We note that the vague penalties referred to in section 6.88.120 can easily be clarified by amendment.

6/ The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

APPENDIX B

PORTION OF TEXT OF PETITION FOR WRIT OF CERTIORARI, FILED IN CONNECTION WITH CASE NO. 92-643, AT POINT III ON PAGES 46-57 ["THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED."]

[Reference: Respondents' Brief in Opposition at 49.]

license revocation proceeding is barred.

III

THE TEST IN WATSON V. BUCK IS CONTROLLING AND MUST BE APPLIED.

In Watson v. Buck, 313 U.S. 387 (1941), the U.S. District Court for the Northern District of Florida had enjoined a Florida State containing a severability clause which had never been before the Florida Supreme Court for interpretation. In reversing that judgment and the granting of the injunction, this Court held at pages 401-402 that a state statute which contains a severability clause must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever matter and against whomever an effort mights be made to apply it ... " before a federal court can interfere with the right of the state court to interpret such legislation.

In such a case it is reversible error for a federal court to grant an injunction and preempt the state court from its func-

tion, unless the record shows there were "exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights...." Further, under Watson v. Buck, that "clear showing" must demonstrate that the danger of irreparable loss "is both great and immediate." Otherwise, the defenses must be set up in the state court even though the validity of the ordinance is challenged, for there is ample opportunity for ultimate review by the United States Supreme Court of federal questions. It is patent upon the face of the record below that the Watson v. Buck requirements of "irreparable loss"..."both great and immediate" have not been established.

(1) A NUMBER OF IMPORTANT STATE INTERESTS ARE INVOLVED

This federal case has impaired a number of important and compelling state interests and rights of the City of Henderson:

(1) The exercise of Home Rule

powers; i.e. to ensure that the license issuing and zoning process is kept free from the perpetration of material fraud by individual license and zoning applicants;

(2) The administration of state laws, to obtain compliance with the precise standards embodied in those laws, and to conduct the state enforcement process free from unwarranted federal interference which disrupts municipal efforts;

(3) The right not to have newly-enacted comprehensive municipal zoning ordinances subjected to federal judicial review to protect the legitimate interests which underlie state laws, until after the state court system has been given an adequate opportunity to review and interpret said laws and the issues are ripe for adjudication;

(4) To practice judicial economy by requiring that litigation involving the above judicial functions be conduc-

ted in the most efficient forum (i.e. the State Court);

(5) A quick, definitive determination of matters involving the operation of a business without a license. Such an activity constitutes a "per se" public nuisance and "per se" irreparable harm which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083.

(6) Suppression of fraud in the governmental license application process. See City of Las Vegas v. Nevada Industries, 772 P.2d 1275, infra, at p. 41-42. It is contrary to established public policy to obstruct state enforcement action against applicants who deliberately make false statements to the government in a business application in order to obtain a license.

(7) Control of the issuance and revocation of revenue-based business licenses, as part of a local revenue collection (taxation) scheme.

Unless effective, summary relief is accorded cities against such unlawful "collateral" appeals by this Court exercising its corrective power under the All Writs Act, the City of Henderson will sustain the same type of irreparable harm as that suffered by the state of Ohio in the Huffman case, and by other cities in similar cases, where important state laws are prevented from being presented to the state appeals courts and this Court for an authoritative construction of state law under the federal Constitution[7].

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[7] Because of the federal court interference with state appellate proceedings, in Huffman, the substantive appellate question involving application of state law (re "closure" of a public nuisance) was never decided, and could never be presented to this Court for definitive review. Huffman involved the power of a state court to close a 100% continuing public nuisance (obscenity) [utilizing a remedial approach acceptable under Red Light Abatement statutes, where the object is the reformation of property used to conduct a per se public nuisance (prostitution)]. Because a final state determination on this important legal issue, regarding the scope of available state remedies, was collaterally blocked by the federal courts in Huffman, an Ohio

(Footnote Continued)

(Footnote Continued)

appellate determination on "closure" was unavailable as a precedent for the state of Ohio and for other state court systems, and the substantive legal issue could not be reviewed by this Court, leaving the "closure" issue, to date, unsettled across the Nation.

The question of the extent to which the states may exercise the remedy of "closure" in connection with the exercise of their police power has arisen in other state cases, with varying results. See State of Idaho ex rel. Kidwell et al. v. U.S. Marketing, Inc. et al., 102 Idaho 451 (1982), jur. noted 454 U.S.1140 (1982), and app. dismissed 455 U.S. 1009 (1982), in which a unanimous State Supreme Court upheld the constitutionality of one-year closure provision and award of attorney fees against a pornographic bookstore. Compare, Jurisdictional Question #1 posed in the Petition for writ of certiorari in Cooper v. Mitchell Brothers Santa Ana Theater et al., No. 81-271, October Term 1980, decided on other grounds in 454 U.S. 90 (1981), and Jurisdictional Question #1 posed in Cooper v. Mitchell Bros. Santa Ana Theater et al., No. 82-345, October Term 1982, denied in 459 U.S. 944 (1982). Because the applicability of "closure" to the public nuisance abatement process involving pornographic outlets has never been answered by this Court, after a protracted, time-consuming and expensive abatement procedure in which it was demonstrated that the defendant Mitchell Brothers had engaged in the regular continuous exhibition of obscene films as a course of conduct continuing over a period of 10 years, the City of Santa Ana was forced to "throw in the towel" in 1987, and settled the controversy by paying defendants their attorney's fees and allowing their pornographic outlet to continue operations in Santa Ana.

(2) THE STATE COURT WITH A "DIRECT" ATTACK ON THE "PENDING" STATE ACTION PROVIDES A MORE EFFICIENT JUDICIAL FORUM FOR THE RESOLUTION OF DISPUTES THAN THE "COLLATERAL" CHALLENGES BEING ASSERTED IN THE FEDERAL COURT AGAINST THE STATE STATUTES AND CITY ORDINANCES IN SUCH "PENDING" CASES.

The exercise of federal jurisdiction striking a state statute or ordinance is not proper, except where the challenged law is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it." Watson v. Buck, 393 U.S. 387 (1941).

Without doubt, the U.S. District Court has jurisdiction in the instant case to decide the question of jurisdiction. U.S. v. United Mine Workers of America, 330 U.S. 258 (1974). Where, however, a state statute or a city ordinance involving an "important state interest" is susceptible of a construction which will render the statute constitutional and a state court action is pending, under Middlesex County Ethics

Committee, supra, the federal court must abstain and must allow the matter to be returned to the state court system for an authoritative construction by the state court. One of the principle reasons why this result is mandated is the fact that a federal court lacks jurisdiction to authoritatively construe state legislation, U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), a task routinely performed by state court.

There is a marked difference in the way in which the state and federal courts approach the constitutional issue regarding legislation. Largely because of the doctrine of separation of powers, the rule has evolved that state courts are obliged to render a construction of state legislation which will arrive at a constitutional result. In People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55 at 56, the California Supreme Court noted, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that

> courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

Because federal courts do not bear the same relationship to state legislatures and do not function in the same manner as regards state legislation, see U.S. v. 37 Photographs, supra, the end result is certain to differ.

Additionally, the question as to whether defective federal and state legislation may be "saved" by statutory construction or by severance of the defective portion presents important public policy matters for federal and state governments. See Tilton v. Richardson, 403 U.S. 672 at 684, where Chief Justice Burger noted:

> "The cardinal principle of statutory

construction is to save and not destroy."

In examining the record of this case, it is apparent that the state system is the most efficient and proper forum for interpreting the interplay of the state statutes and municipal ordinances involved. Were the constitutionality of the "conditional use" zoning laws an issue[8],

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[8] The constitutionality of the conditional use in the CH zone is not yet in issue, inasmuch as the federal plaintiffs never applied for a variance or a special use permit. Shelter Creek Development Corp. v. City of Oxnard, 838 F.2d 375 (CA9, 1988); Ill. Commerce Comm'n v. Thompson, 318 U.S. 675, and National Bank v. Bd. of County Commissioners, 264 U.S. 450 (1924). When the conditional use ordinance is properly made an issue, the construction to be given the newly enacted legislation is one for the Nevada Courts, not the U.S. District Court. See Watson v. Buck, supra, discussed at pages 46 - 47, herein, and U.S. v. 37 Photographs, 402 U.S. 363 at 369-375 (1971) and U.S. v. 12-200 Ft. Reels of 8mm Film, 413 U.S. 123 at 130, fn. 7. Compare, in this regard, the construction given by California Courts to People v. Library One, Inc., 229 Cal.App.3d 873 (1989), and Thomas v. County of Los Angeles, 232 Cal.App.3d 916 (1991), re the effect of this Court's ruling in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) on specific time limits during which decision is required on permit applications, and note, in this regard, that the issue here is license revocation, not license procurement.

there is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied, and only a state court has both the right and duty to give the same a constitutional interpretation. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [4th Cir. 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S. Court of Appeals for further consideration in light of FW/PBS, 493 U.S. 215 (1990)].

The question as to whether a state statute is severable is more properly a matter for the state court. In a statement confirming the importance of the "statutory construction" factor and the right of state courts to interpret city ordinances, this Court in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (involving a direct appeal of a city ordinance after a state court decision by the California Supreme Court

upholding the ordinance as being constitutional on its face) remanded the case back to the California Supreme Court for further statutory construction by the state court, notwithstanding the fact that this Court held the ordinance to be unconstitutional on its face[9]. See in this regard, Associate Justice White's opinion in Metromedia, Inc., announcing the judgment of the Court, at 521, fn. 26, wherein he addresses the issue of severability and the right of state courts in that regard.

IV

FEDERAL PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN THAT THEY HAVE FAILED TO PLEAD AND PROVE WHY THE PRINCIPLES ESPOUSED IN WATSON V. BUCK AND HUFFMAN V. PURSUE, LTD. DO NOT CONTROL SO AS TO REQUIRE A DISMISSAL FOR LACK OF FEDERAL JURISDICTION.

Under the rationale expressed in Allen

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[9] Unlike the "Humpty-Dumpty" approach of the federal court system (which cannot construe a state law), the superiority of the state forum is self-evident where the "egg" can immediately be put back together again.

APPENDIX C

HENDERSON NEWS ARTICLES REPORTING UPON CRIMINAL ACTS (TWO MURDERS) UPON THE PREMISES INVOLVED.

[Reference: Respondents' Brief in Opposition at 51.]

Clerk found murdered in porn viewing booth

4/16/90

By Katherine E. Scott
News Staff Writer

A 22-year-old night clerk at Fantasy Video Plus was found shot to death inside a viewing booth early Sunday morning following an apparent robbery, according to the Henderson Police Department.

Denver Duane Turner was shot three times in the back of the head with a .22 caliber weapon, the Clark County Coroner's Office reported Monday. Police said Turner was last known to have been alive when his roommate spoke with him about 1 a.m. Sunday.

Police were called around 5:20 a.m. by a customer who found Turner's body at the back of the adult-oriented novelty store, HPD Detective Richard Perkins said Sunday at the scene. He said money was missing from the store.

"A security video tape is being reviewed as part of the investigation," police stated in a press release. Police are asking any persons with information to contact investigators at 565-2031 or 565-2004, the detective bureau at 565-2009 or the police department at 565-8933.

Police said Turner's body was found in a viewing booth in the southeast section of the Boulder Highway store. The door to the booth was open when the customer—a man in his 40s—found the victim.

Police said store management locked the business Sunday morning, with plans to open the following day. An electronic reader board in front of the store said the business would be closed until noon Monday, with no late fees to be charged.

That was believed to be the first time the store has closed its doors since opening on Feb. 1. The city of Henderson revoked the company's business license April 10 due to alleged misrepresentations in the application process, but the store has remained open pending a lawsuit filed April 24 in U.S. District Court.

Henderson Assistant City Attorney Liza Conroy said last month that the city is attempting to have the action moved to Clark County District Court because it believes licensing is the issue. Fantasy Video spokespersons have said their constitutional rights are being denied by the city, and that the case should remain in federal court.

Fantasy Video murder suspects caught in Oregon

11/14/90

By Katherine E. Scott
News Staff Writer

Suspects in the Nov. 4 murder of a Henderson porn store clerk are being held in Oregon pending extradition to face charges here, according to the Henderson Police Department.

Police said Amber Lynn Adams and Lance Matthew Reberger were apprehended in Coos Bay, Ore. on Friday morning, after local police entered them as suspects in the National Crime Information Computer.

They are suspected of shooting 22-year-old Denver Duane Turner early Nov. 4 as he worked in Fantasy Video Plus, an adult-oriented novelty store located on Boulder Highway.

The victim was shot three times in the back of the head, according to the Clark County Coroner's Office. Police said his body was found in a viewing booth in the back of the store by a customer who entered the store shortly after 5 a.m.

A police investigation found evidence implicating Adams and Reberger, providing enough information for them to be placed in the NCIC system, police said. Adams was also known with the surname Harvey, police said.

No cash taken in robbery at Fantasy Video

9/24/90

No cash was taken in an armed robbery at Fantasy Video last week, according to the Henderson Police Dept.

Police said a young, blond man took less than $100 worth of sexual aids from a clerk at the Boulder Highway store about 4:25 a.m. Thursday. A small caliber chrome automatic pistol was used, according to police.

"A security camera was operating at the time and the suspect was photographed," HPD Assistant Chief Kip Botkin said Monday. He added that police detectives are investigating the incident.

Murder suspects to fight extradition

11/15/90

By Katherine E. Scott
News Staff Writer

Suspects in the Nov. 4 murder of a clerk at Fantasy Video Plus, who Henderson Police said had first agreed to waive extradition from Oregon, instead said they would fight extradition when they appeared before a judge Tuesday in Coos Bay, Ore.

Amber Lynn Adams, 22, and Lance Matthew Reberger, 24, face charges of murder, robbery and burglary in the death of 22-year-old Denver Duane Turner at the adult-oriented novelty store on Boulder Highway. They were arrested Friday at a homeless shelter in the Oregon town, HPD Sgt. Ray Moser said in a telephone interview Tuesday.

HPD Detective Monty Sparks, who traveled to Oregon to investigate the case, said that "during the court appearance on Tuesday they requested council, and their extradition hearing was continued until Tuesday of next week."

Sparks said during a telephone interview Wednesday that the pair "were abusive and obnoxious during their court appearance, and totally disrespectful."

Moser said the two were identified as suspects following a tip which led investigators to several persons who provided enough evidence of their guilt that police were able to seek a warrant for their arrest.

He said a video surveillance tape police removed from the store had run out before the murder occurred. Turner was believed to have been killed approximately between 1 a.m. and 5 a.m. on Nov. 4.

Henderson police entered Adams and Reberger into the National Crime Information Computer on Thursday, Nov. 8, Moser said. He said police officers in Coos Bay recognized the couple from a recent child abuse report, and arrested them at the homeless shelter where they were staying.

Sparks said Oregon's Child Protective Services is caring for Adams' 3-year-old son. He said the child's natural father, who lives in Las Vegas, is seeking custody.

Police said Adams, also known with the surname Harvey, was from the Las Vegas area. Reberger was believed to be a transient who came here from Florida.

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Police said Adams, also known with the surname Harvey, was from the Las Vegas area. Reberger was believed to be a transient who came here from Florida.

Fantasy Video murder suspect gets second preliminary hearing

5/16/19

By Katherine E. Scott
News Staff Writer

One defendant in last year's murder of a clerk at Fantasy Video Plus was scheduled recently for a second preliminary hearing in Las Vegas Justice Court on June 18.

Lance Matthew Reberger was to stand trial Monday in Clark County District Court on charges of murder, robbery and burglary. However, his case was remanded for a new preliminary hearing following a May 3 court appearance.

Defense attorney Phil Dunleavy said Wednesday that he was assigned the capital murder case after it had reached District Court for trial. "I didn't feel the man had

Murder suspect trial starts Monday

6/6/91

By Katherine E. Scott
News Staff Writer

Amber Lynn (Harvey) Adams, 22, is scheduled to stand trial Monday in Las Vegas District Court for the Nov. 4 murder of a local adult-oriented video and novelty store clerk.

Adams and 24-year-old Lance Matthew Reberger are charged with murder, robbery and burglary for the death of 22-year-old Denver Duane Turner inside Fantasy Video Plus last year. Reberger faces a June 18 preliminary hearing in Las Vegas Justice Court.

A motion to suppress evidence was denied last week, and Adams' court dates still stood as of presstime, according to court records. A calendar call is scheduled today.

Adams and Reberger were arrested on Nov. 9 in Coos Bay, Ore., after police there received a bulletin from Nevada that they were suspected in a murder here. Oregon officers recognized the couple from a child-neglect investigation a day earlier regarding Adams' young son.

Both waived extradition, and Adams also waived her preliminary hearing. She was later found competent to stand trial following a psychiatric evaluation ordered by Las Vegas District Court.

She was remanded to Justice Court for a March 18 preliminary hearing, then was bound over for a jury trial, scheduled to begin on Monday.

Porn store robbed

9/9/93

Henderson police are seeking a gunman who robbed the Pure Pleasure adult book and video store on Boulder Highway Tuesday night.

"The clerk advised that a [man in] a mask, brandishing a shot He fled on foot with an undisclosed amount of cash.

The suspect was wearing blue denim pants and a dark T-shirt, police said. Any person with information are asked to call the

ıre Pleasure suspect nabbed

12/21/93

By Thomas Moore
News Staff Writer

nderson Police have arrested ın suspected of robbing the Pleasure adult bookstore e and is suspected of robbing ıilar store in Las Vegas. uart Whiting, 22, of no known ress was arrested last Wednesday for the robberies which occurred on Dec. 14 and Nov. 26. He was arrested at Vo-Tech, where he was attempting to pick up his girlfriend.

Whiting was transported to the Henderson Jail and booked on two counts of armed robbery. He is being held on $60,000 bail.

Adult bookstore robbed once again

3/15/94

By Thomas Moore
News Staff Writer

An allegedly intoxicated robber was caught Sunday after stealing $12.95 in magazines and $7.50 in token coins from the Pure Pleasure Video and Bookstore on Boulder Highway at approximately 8:35 p.m.

According to a Henderson Police Department news release, Eugene Charles Lee, 32, of Henderson and a past customer, walked into the store and threatened to shoot the clerk if he did not give him some cash.

The clerk gave the man $12.95 in token coins and as the suspect walked out he grabbed a magazine. The police searched the surrounding area and found Lee drinking in a bar on Boulder Highway not far from the scene of the crime. He was arrested and taken to the Henderson Jail where he was booked on a charge of robbery.

Adult bookstore scene of slaying

5/3/94

By Thomas Moore
News Staff Writer

A Las Vegas man was shot in the chest early Friday morning outside the Pure Pleasure adult bookstore on Boulder Highway. He died later that morning during surgery at the University Medical Center.

According to a Henderson Police Department news release, Redentor Castillo Nicolas, 27, had been inside Pure Pleasure some time before 2 a.m. He left the store but then returned to the store to tell the clerk he had been shot and then collapsed onto the floor. The clerk called the police and paramedics. Nicolas was taken to UMC where he died at 5 a.m.

Police have videotape, taken from surveillance cameras in the store, that shows two possible suspects who were in the store shortly before the shooting.

The first suspect was described as a white male in his late 20s or early 30s standing about 5 feet, 9 inches tall, weighing from 160 to 180 pounds with sandy brown hair. He wore a dark colored baseball cap, a green camouflage jacket, blue jeans and light-colored tennis shoes.

The second suspect was in the same age range, but stood approximately 5 feet, 7 inches tall and weighed 150-160 pounds. He also had sandy brown hair and wore a dark-colored baseball cap and light-colored tennis shoes. However, this suspect was wearing a brown-colored camouflage jacket and bluish-grey short pants.

The two suspects drove away in a white vehicle. Anyone with information is asked to call Henderson Detective James White, 565-2031.

Arrests made in death

6/7/94

By Thomas Moore
News Staff Writer

Police have arrested two suspects in the April shooting death of a man outside the Pure Pleasure Adult bookstore.

Carl George Schulte, 25, of Henderson and Larry John Ledale Gomer, 22, of Chino, Calif., were arrested for the murder while already in the Henderson Jail for stealing a motor vehicle.

Redentor Castillo Nicolas was killed Friday, April 29, shortly after 2 a.m. after visiting the store. The police had surveillance tapes of some people who were in the store before the killing but were unable at the time to find the killer.

APPENDIX D

CITY ATTORNEY LETTER DATED NOVEMBER 17, 1994, REPORTING ON COSTS OF ABSTENTION LITIGATION TO DATE.

[Reference: Respondents' Brief in Opposition at 51.]

CITY OF HENDERSON
CITY HALL 240 WATER STREET 702/565-2323
HENDERSON, NEVADA 89015
Gateway to Lake Mead Resorts

November 17, 1994

James J. Clancy, Esq.
9055 LaTuna Canyon Road
Sun Valley, CA 91352

Re: Nevada Entertainment Industries, Inc. v. City of Henderson, et al.

Dear Jim:

You have requested a compilation of costs incurred by the City to date in litigating the case of Nevada Entertainment Industries, Inc. v. City of Henderson, et al.

I have compiled the attorney's fees and costs for outside counsel and estimated our in-house counsel time.

Outside counsel fees and costs are as follows:

1990-91	$41,530.02
1992	21,794.68
1993	24,161.20
1994	32,728.08
TOTAL	$120,213.98

The time estimates for in-house counsel in litigating the initial stages of the case and in later review and discussion of the ongoing litigation are set forth below. Since we do not keep track of hours on a per case basis, these estimates are true estimates derived by reviewing the files, documents and transcripts to arrive at an approximation of the time involved.

Based upon a reasonable billing amount in the legal community of $100 per hour, I arrived at the following values:

1990	80 Hrs.	$8,000.00
1991	45 Hrs.	4,500.00
1992	25 Hrs.	2,500.00
1993	25 Hrs.	2,500.00
1994	15 Hrs.	1,500.00
TOTAL		$11,000.00

Additionally, you requested copies of newspaper clippings concerning criminal activity at the subject premises which included two homicides. Attached to this letter are xerox copies of newspaper clippings from the Henderson Home News.

If you need any additional information, please do not hesitate to contact me.

Very truly yours,

Liza Conroy
Assistant City Attorney

LC/avm

Enclosures

BEST AVAILABLE COPY

APPENDIX B-1

PAGES 51-61 OF PETITION FOR A WRIT OF CERTIORARI IN CITY OF HENDERSON ET AL. v. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., NO. 90-1771.

[Reference: Petitioners' supplemental Brief in No. 94-662 at pages 2, 3 and 4.]

Text at pages 2-3 reads:

" Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's Eleventh Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine."

Text at pages 3-4 reads:

" During the past 4 years, the City has articulated its reasoning to this Court not only in general terms, but also with reference to the specific example the City had in mind, in its first petition for writ of certiorari in No. 90-1771 at pages 51-61, (see Appendix B-1 at pages 53-54 to this brief) in relation to the opinion in 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 (CA 4 1989) - a lawsuit that was filed 8-1/2 years ago (May 1986)."

have rejected it. A sampling of these cases appears below in footnote 6."

There is national concern over the negative effects of "Adult Businesses." Communities across the United States have confronted the problem of how to contain and restrict the "secondary effects" associated with the presence of so-called sexually-oriented or "adult businesses" (for example, effects such as urban blight, property depreciation, and crimes). In a series of cases, this Court has upheld the right to use zoning ordinances to restrict the location of "adult businesses" [Young v. American Mini Theatres, 427 U.S. 50 (1976), Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1986), and FW/PBS, Inc. v. Dallas, 493 U.S. ___, 107 L.Ed.2d 603, 110 S.Ct.___ (1990)]. This court should not allow the Home Rule Powers of the City of Henderson, a charter city, be

violated and the enforcement of "home rule" public rights by municipalities under zoning laws to become obfuscated by spurious "constitutional" claims as are made by Real Parties in Interest. This Court has held that zoning ordinances seeking to restrict location of "adult uses" are valid, and do not constitute impermissible prior restraints on free speech, and that such laws are adequately supported by municipal interest in planning and regulating the use of property for commercial purposes. Young v. American Mini Theatres, supra. A city's interest in the character of its neighborhoods and the preservation of the quality of urban life and its Home Rule Authority must be accorded high respect. Renton v. Playtime Theatre, Inc., supra.

This action imposes no restraint at all on Fantasy Video Plus' dissemination of particular materials, since it is

free to carry on its business in a lawful fashion at another location. The fact that such locations may be difficult to find is immaterial. Arcara v. Cloud Books, Inc., 478 U.S. 697, 92 L.Ed.2d 568 at 577, fn. 2, 106 S.Ct. 3172 (1986).

There is ample authority to support the legal proposition that a conditional use zoning ordinance similar to that which has been adopted by the City of Henderson can be constitutionally applied. See 11126 Baltimore Blvd. v. Prince George's County, Md., 886 F.2d 1415 at pages 1426-1429 [CA4 1989, Rehearing and Rehearing en Banc denied October 25, 1989; cert. granted, remand to U.S.Court of Appeals for further consideration in light of F.W./P.B.S., 493 U.S. ___, 107 L.Ed.2d 603 (1990)].

In the instant case, Fantasy Video Plus did not apply for a conditional use permit and thus failed to exhaust its

administrative remedies, as required. See Shelter Creek Development Corporation v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988) [challenge to constitutionality of city zoning ordinance held not ripe for judicial adjudication as parties never applied for variance or special use permit]; see, also, Ill. Commerce Cmm'n v. Thompson, 318 U.S. 675 and First Nat'l Bank v. Bd. of Cnty Cmmn'rs, 264 U.S. 450 (1924)]. Consequently, the constitutionality of the conditional use in the CH zone is not yet in issue.

III

THE CITY OF HENDERSON HAS BEEN, AND IS PRESENTLY, SUFFERING "IRREPARABLE HARM."

The operation of a business without a license is a public nuisance which requires abatement. See World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1083. The

federal injunction is preventing the City from performing its civil function under its Home Rule Powers.

This federal action is barred by Younger-Huffman principles, which are grounded in the 11th Amendment, and are based upon a Constitutionally mandated deference to state courts in recognition of state sovereignty. Younger-Huffman requires that federal courts refrain from interefering with state court review of administrative application of state law, where the state has enforced its laws or has begun to enforce them. See, also, Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) [the Court applied the articulation found in Middlesex County Ethics Committee v. Garden State Bar Ass'n, 456 U.S. 423 (1982) of the Younger to ongoing state administrative proceedings, judicial or otherwise, in which important state interests are

vindicated and in which the federal plaintiff would have a full and fair opportunity to litigate consitutional claims]; and Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987) [Texaco (the state defendant) filed an action in federal court which sought to enjoin Pennzoil (the state plaintiff) from taking any action to enforce a multibillion dollar judgment that a Texas state court had rendered against Texaco and in favor of Pennzoil. Texaco did not avail itself of available state remedies, but filed an injunctive action in federal court. The Court found that the existance of an available state forum in which to Texaco could have raised its claims (which forum the Court held would be considered adequate until proved otherwise) barred Texaco's federal action.]

State proceedings (not tainted by bias, bad faith or harassment) for which

the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is initiated, until it has completed the review process. The City of Henderson began the adjudicative process of enforcing its laws when it initiated the quasi-judicial administrative proceeding before the City Council, which resulted in a determination by the City Council that Fantasy Video Plus' business license should be revoked because of fraudulent misrepresentations made in their business license application. The City Council stayed the enforcement of that revocation, in order to allow Fantasy Video Plus to pursue its right to state judicial review of the City of Henderson's revocation of said business license. The availability of state judicial review created an adjudicative continuum which existed at the time

Fantasy Video Plus filed its federal complaint. Alleghany Corp. v. Haase, 708 F.Supp. 1507 (W.D.Wis. 1989) at 1515-1519. The same Younger concerns that apply to ongoing administrative proceedings apply to ended administrative proceedings, where state court review is available. Alleghany Corp. v. Haase, supra, at 1515. See also Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635 (6th Cir. 1990) at 639-640, citing World Famous Drinking Emporium, 820 F.2d 1079 (9th Cir. 1987) [Court found federal plaintiff clearly had unexhausted state appellate remedies where it had opportunity to appeal decision of Board of Building Appeals through state judicial system, holding "there was therefore an on-going state proceeding in this case" at the time the federal complaint was filed and that the Younger doctrine was applicable].

In this case, Fantasy Video Plus

lost its business license because of intentional fraudulent misrepresentations made in its application form. It is contrary to established public policy to preclude state enforcement action of Home Rule Powers against applicants who deliberately make false statements to the government in a business application in order to obtain a license. A federal litigant who has exhibited such "bad faith" is not entitled to a federal forum.

The preliminary injunction is a clear example of an unauthorized collateral federal appeal which substantially disrupts and interferes with the state appellate procedures which are en train. 4/

4/ The same jurisdictional issue was before the United States Supreme Court in Huffman, supra. There the Lucas County Common Pleas Court had entered a (Footnote Continued)

Additionally, because the declaratory judgment action was filed in state court before proceedings of substance on the merits took place in the federal court, the federal complaint should have been dismissed on the State's motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of Younger v. Harris, 401 U.S. 31 (1971), and related cases. Hicks v. Miranda, 422 U.S. 332, 349-350 (1975).

(Footnote Continued)
final injunction of "closure" on a hard-core pornographic theater, after holding that the autoptical evidence (film and time and motion studies) established that a public nuisance existed at that theater under the Ohio Red Light Abatement Statute. The entry of that final injunction started the running of the statutory time for filing an appeal to the Court of Appeal and Ohio Supreme Court. Because the federal trial court wrongfully assumed jurisdiction and granted injunctive relief the important adjudication of "closure" was prevented from being adjudicated in the Ohio Judicial System.

IV
CONCLUSION

Wherefore, Petitioners request this Court to:

(1) Grant a writ of certiorari pursuant to Rule 13 and require the United States District Court to vacate and annul its March 22, 1991 Order and to grant Petitioners' Motion to Dismiss the federal complaint on the ground of lack of federal jurisdiction.

(2) Pending action on this Petition, issue an Order requiring the United States District Court to stay the trial and the proceedings in the Court below which are presently set for Monday June 3, 1991.

Dated: May 16, 1991

James J. Clare

Attorney for Petitioners

APPENDIX B-2

PAGES 7-12 OF PETITION FOR A WRIT OF CERTIORARI IN CITY OF HENDERSON ET AL. v. NEVADA ENTERTAINMENT INDUSTRIES, INC. ET AL., NO. 92-643.

[Reference: Petitioners' Supplemental Brief in No. 94-662 at pages 2-3.]

Text at pages 2-3 reads:

" Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's Eleventh Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine."

The federal civil rights action was initiated by the Real Parties in Interest as a defense to the ongoing state license revocation enforcement proceedings. The case is now again before this Court for review, this time on petitions for a writ of certiorari and a peremptory writ of mandamus, on both the jurisdictional issue and concomitant res judicata and collateral estoppel questions.

(A) THIS COURT'S DECISIONS IN WATSON V. BUCK, HUFFMAN V. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE V. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION.

Seventeen years ago, as counsel of record for the Appellant in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), counsel of record for Petitioners herein contended in Appellant Huffman's Jurisdictional Statement, Opening Brief, at oral argument, and in a Petition for a Rehearing (see 421 U.S. 971), that in a 42 U.S.C. section 1983 action involving what constitutes a "collateral attack" against a "pending" state decision or order, the "jurisdiction" question (over

the "res" subject matter) must first be addressed by the Federal Court, even before a resolution of any question as to an extension of the Younger abstention doctrine to civil cases[2]. [See Younger v. Harris, 401 U.S. 37 (1971).]

Justice Rehnquist's majority opinion in Huffman did not address the controlling United States Supreme Court precedents which had been cited by Huffman regarding the "res" jurisdiction issue. Instead, the opinion decided the case solely on the basis

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[2] Huffman arose as an attack against a state court's final judgment determining the existence and abatement of a public nuisance and involved the use of real property. This type of suit was regarded at common law as being "in rem." In such an action, jurisdiction over the subject matter (i.e. the real property or the "res") could only be before one court at a time, and that rule was applied in cases involving the federal-state relationship.

On appeal, Appellant's primary argument had been that the trial court lacked jurisdiction to proceed with the federal civil rights action, filed on December 1, 1972, inasmuch as a final judgment of abatement of the public nuisance involved had been entered in the State Court on the

(Footnote Continued)

of the Younger issue, without ruling explicitly that Younger was jurisdictional. His opinion remanded the case to the federal trial court for a determination as to whether "the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind" (our emphasis). See Huffman at 420 U.S. 612. That ambiguity generated a dissent by Justices Brennan, Douglas, and Marshall, see Huffman at 420 U.S. 613, fn. 1, which drew into question whether Younger v. Harris abstention was jurisdictional. While Justice Rehnquist's majority opinion did not address Appellant Huffman's primary "jurisdiction" contention, it did, however, underscore the fact that the Huffman Court was not suggesting "that the normal rules of res judicata and judicial estoppel do not

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(Footnote Continued)
previous day, November 30, 1972, and the state action and "res" were still "pending" in the state court during the time allowed for post-trial motions and until the appeal period had expired.

operate to bar relitigation in actions under 42 U.S.C. section 1983 of federal issues arising in state court proceedings...Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case." See Huffman, at 420 U.S. 606, fn.18.

Questions 1 and 2 of the Petitions herein raise the same two issues of "jurisdiction" and "estoppel" which were discussed in Huffman, in the light of the Huffman background (a "pending" state action). The trial court record and Petitions herein place before this Court for summary resolution the identical "jurisdiction" issue which was argued in Huffman and, in addition, the "res judicata/collateral estoppel" question which was discussed by Justice Rehnquist, but not then before the Huffman Court for decision. Petitioner contends that in the intervening seventeen years, the "jurisdictional" basis of Huffman has been clearly established (see Point I at pp. 29-

38, herein), and the "res judicata/collateral estoppel" issue has been firmly resolved in University of Tennessee v. Elliott, supra (see Point II at pp. 38-46, herein). A peremptory writ of mandate ordering a dismissal of the federal civil rights action below under the All Writs Act should therefore issue on the simple authority of the Huffman and University of Tennessee cases, in order to prevent the City of Henderson from suffering the same kind of "irreparable harm" which flows from a "collateral" attack through the mechanism of a federal case which is improperly permitted to continue on the merits (see Point III at pp. 47-57, infra), and to prevent the U.S. District Court from issuing an opinion which is in conflict with the related final state decision (regarding the parties' rights arising out of the City's license revocation action), and advisory in nature in violation of Article III of the U.S. Constitution which bans issuance of advisory opinions by lower federal courts.

Further, to the extent that the Real

Parties in Interest's civil rights action attempts an attack upon the "new, comprehensive municipal zoning code and municipal license code" enacted in 1989 (see Statement of Facts at page 12), such is barred by Watson v. Buck, 313 U.S. 387 (1941) and the federal right of a city or state to have newly enacted legislation, containing a severability clause, construed initially by the state court system. [See Huffman v. Pursue, Ltd., supra, at fn. 14 for reference to Watson v. Buck principle.]

STATEMENT OF FACTS

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a

APPENDIX B-3

PAGES 11-16 OF PETITION FOR WRIT OF MANDAMUS AND PAGES 9-20 OF SUPPLEMENTAL BRIEF IN NO. 93-1969. [Reference: Petitioners' Supplemental brief in No. 94-662 at pp. 2-3 and 11-12.]

Text at pages 2-3 reads:

" Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's 11th Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine. See...Petition for Writ of Mandamus in No. 93-1969 at pp. 11- 16, and Supplemental Brief at pp. 9-20...."

Text at pages 11-12 reads:

" Further, as Henderson's Respondents' Brief in Opposition (filed on Dec. 1, 1994) points out, even if that were so, (which it clearly is not), the federal Court still would lack "subject matter jurisdiction" under its Article III powers and the Eleventh Amendment, and Huffman v. Pursue, Ltd., supra, in accordance with the analysis and distinctions recently drawn by the Ninth Circuit panel of Judges in Dubinka v. Judges of the Superior Court, 23 F.3d at 222 and 225-226 (CA 9 1994), which points out the functional difference between the Feldman doctrine, 460 U.S. at 486-488 and the Huffman abstention doctrine. See Supplemental Brief to Petition for Writ of Mandamus in Case 93-1969, at pp. 19-20...."

An application for stay of the trial pending a ruling on the petition for writ of certiorari in No. 90-1771 was made to Justice O'Connor on May 9, 1991 and denied on May 16, 1991. A second application in No. 90-1771 was made to Justice Kennedy who referred the matter to the Court which denied the application on June 10, 1991. An application for stay of the trial pending a ruling on the petition for writ of certiorari in No. 92-693 was made to Justice O'Connor and denied by her on October 27, 1992.

On November 27, 1992, while the petition for writ of certiorari in No. 92-649 was still pending in this Court, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL). See Appendix A.

On November 27, 1992, the United States District Court entered an Order and Final Judgment in which the Federal

Court erroneously relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.
>
> "Rather, plaintiffs inquired whether a business license would be

> approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants

filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. Reference: footnote 1 on page 10, supra. See Supplemental Brief at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion

in which it denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response[2/] to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a

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2/ A copy of the City's Response is being filed with the Clerk of this Court for purposes of reference in connection with this Petition for Writ of Mandamus.

In this Petition for Writ of Mandamus, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a usurpation of the judicial power, and are void.

Recent decisions of the Ninth Circuit underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger Abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

I

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION.

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v.

Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of mandamus, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in

Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

The City of Henderson claims that the analysis in Wiener v. Counties of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet

been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away

with the confusion which is presently generated in the race to the Courtroom.

II

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the neglect of the County Counsel to focus upon the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387 (1941). As a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same

> legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective). Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

and a State court has the duty to give a constitutional interpretation to a state law, if at all possible. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 61, 130 Cal.Rptr. 238, at 339 (1976):

> "We [the state court] are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942, 83 Cal.Rptr. 686, 464 P.2d 142)."

See, also, Petition for Writ of Certiorari in City of Henderson et al.

v. Nevada Entertainment Industries, Inc., No. 92-643 at pages 46-57.

Because Watson v. Buck: (1) is well known in relation to its reference in Huffman, (2) was cited and referred to in Dubinka at p 225; and (3) has been repeatedly cited to the Ninth Circuit in the City of Henderson 4 year record, it would appear that the Wiener Court's analysis should have considered the law expressed in Watson v. Buck. Instead, the Court stated at p. 267 that:

> "As Wiener states there is no reason why the California State Courts should mind if a federal court resolves his claims. We therefore agree with Wiener that the full predicate for Younger abstention was not met."

Petitioners contend that Justice Browning was remiss in his willingness to accept and support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court,

including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix 7 page 7-7 herein and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in

substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

The propriety of federal court interference in pending state adjudications, involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to

set up a Constitutional "collision course."

III

IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY.

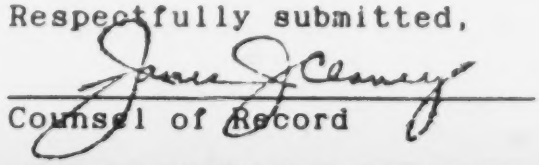
The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to this Petition for Writ of Mandamus is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman challenge, See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

CONCLUSION

Dubinka clearly establishes that the Ninth Circuit's analysis and orders in In Re City of Henderson v. Nevada Entertainment Industries Inc., (supra) on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Mandamus should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Mandamus.

Dated: September 16, 1994

Respectfully submitted,



Counsel of Record

APPENDIX B-4

PAGES 51-64 OF PETITION FOR WRIT OF CERTIORARI IN NO. 94-662.

[Reference: Petitioners' Supplemental Brief in No. 94-662 at pages 3 and 12.]

Text at pages 2-3 reads:

"Four years ago, the original Fourth Circuit opinion in 11126 Balt. Blvd., Inc. v. Prince George's County, Md., was one of the considerations for undertaking the City's 11th Amendment challenge under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). At that time, the City felt that since the Nevada "conditional use" zoning concept was about to be challenged in the Courtroom, that challenge should occur in the state court system pursuant to Nevada's "first principle" "sovereign right," as a sovereign state, which "right" arises out of the commandment of the Eleventh Amendment; where, on appeal, it would be given a definitive interpretation and review by the Nevada Supreme Court under the U.S. Supreme Court's binding Judgment and corollary right arising out of this Court's opinion in Watson v. Buck, 313 U.S. 367 (1941) often referred to as the Watson v. Buck abstention Doctrine. See Henderson...Petition for Writ of Certiorari in No. 94-662 at pp. 51-64."

Text at pages 11-12 reads:

" Further, as Henderson's Respondents' Brief in Opposition (filed on December 1, 1994) points out, even if that were so, (which it clearly is not), the federal Court still would lack "subject matter jurisdiction" under its Article III powers and the 11th Amendment, and Huffman v. Pursue, Ltd., supra, in accordance with the analysis and distinctions recently drawn by the Ninth Circuit panel of Judges in Dubinka v. Judges of the Superior Court, 23 F.3d at 222 and 225-226 (CA 9, April 8, 1994), which points out the functional difference between the Feldman doctrine, 460 U.S. at 486-488 and the Huffman abstention doctrine. See...Point I(C) of the Henderson's Petition in 94-662 at pages 61-64."

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Dubinka analysis, and that the incorrect view is that which is espoused by the Wiener and Henderson decisions.

I(A)

THE DUBINKA AND WIENER OPINIONS DECIDED APRIL 8, 1994 AND MAY 2, 1994 CLEARLY ESTABLISH THE VALIDITY OF THE CITY OF HENDERSON'S CLAIM THAT THERE IS A SPLIT OF AUTHORITY ON THE NINTH CIRCUIT AS TO THE MEANING OF HUFFMAN-YOUNGER ABSTENTION AND THAT THE COURT OF APPEALS BELOW ERRED IN REFUSING TO DISMISS THE CIVIL RIGHTS LAWSUIT UPON THE "LACK OF SUBJECT MATTER JURISDICTION ISSUE".

One day after the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion which had upheld Huffman-Younger Abstention, another Ninth Circuit panel (Fletcher, Pregerson and Hall) filed its opinion in Dubinka v. Judges of the Superior Court, 23 F.3d 218 (argued and submitted December 8, 1993) involving the Feldman and Younger doctrines, as those doctrines implicate the "subject matter jurisdiction" question, which the City of Henderson claims is and has been the central issue in its cross-appeal herein. The City

claims that the April 8, 1994 opinion in the Dubinka case correctly analyzes those three issues [Feldman doctrine, Younger abstention, and "lack of subject matter jurisdiction"], is apposite on this petition for writ of certiorari, and should require that the Court of Appeals (Browning, Canby, Kelleher) November 2, 1994 opinion and judgment in Nevada Entertainment Industries, supra: (1) be reinstated, and (2) amplified to include a resolution of the "subject matter jurisdiction" issue as was undertaken in the Dubinka case.

Four weeks later, a third Ninth Circuit panel filed a contrary analysis in Wiener v. County of San Diego, 23 F.3d 263 [Browning, Pregerson, and Brunette, argued and submitted April 5, 1994, and decided May 2, 1994] involving the Younger abstention issue. That opinion did not undertake an analysis of the "subject matter jurisdiction" issue, and presents an entirely different view as to the "meaning" of the Younger-Huffman Doctrine. In

Wiener, the Court of Appeals panel reversed the trial court's judgment, which had denied Wiener's motion for a preliminary injunction and dismissed the case upon the grounds of Younger abstention. Judge Browning sat in both the City of Henderson and Wiener appeals.

Judge Browning and the Ninth Circuit Panel erred similarly in the City of Henderson appeal herein in refusing to rule upon the "lack of subject matter jurisdiction" issue, which refusal invited the Nevada Entertainment Industries Inc.'s to file its petition for rehearing and suggestion that the Court rehear the matter enbanc on November 30, 1993. See in this regard, the City's response to that petition for rehearing at Appendix Pages 4-10 thru 4-17, where the City contends that the Court of Appeals continuing failure to address the Eleventh Amendment and the "lack of subject matter jurisdiction" issues is responsible for the confusion which is flowing from the Ninth Circuit's Huffman decisions, and the

conflict within the Ninth Circuit as examplied by the recent clash between the Wiener, supra, and Dubinka, supra, analysis.

The City of Henderson claims that the analysis in Wiener v. County of San Diego is in error for the same reason the City of Henderson opinion is in error, in failing to apply the law expressed in Watson v. Buck, 313 U.S. 387 (1941). Younger abstention should have controlled, in that such "new" legislation had not yet been interpreted by the state judiciary and the trial court's judgment of dismissal upon abstention grounds in Wiener should have been upheld.

In this regard, the City of Henderson contends that the same principle controls both Henderson and Wiener: one of the perquisites flowing from state sovereignty and the Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such new legislation interpreted for the first time by a state

court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible; and

(3) where possible, not to be burdened by the cost of duplicate litigation of the same issue in two different courts. One positive advantage of this Proposition of Law, as stated, is that it assigns priorities and does away with the confusion which is presently generated in the race to the Courtroom.

I(B)

WIENER V. COUNTY OF SAN DIEGO, 235 F.3d 263 WAS WRONGLY DECIDED.

The Wiener case was wrongly decided. In that appeal, the federal panel (Browning, Pregerson and Brunetti) on May 2, 1994 (two days before the May 4th action in this case), reversed the trial judges conclusion that Huffman abstention applied to the facts, due to the failure of the County Counsel to focus upon the importance of the Eleventh Amendment, the Anti Injunction Statute, and Watson v. Buck, 313 U.S. 387

(1941). The City contends that, as a matter of law, the Huffman abstention challenge in the Wiener case should have been upheld on the basis of the Eleventh Amendment and Watson v. Buck, 313 U.S. 387 (1941), and the County Counsel's arguments appearing at page 266 of the Court's opinion:

> "By our holding, we reject the County's argument that Younger requires only that the pending state judicial proceeding concern the same legal issues that are raised by the federal action (e.g., validity of locational restrictions). An identity in legal issues is not a sufficient predicate to compel abstention where a plaintiff challenges a different law." (Our Emphasis.)

Even if the substitute San Diego County ordinance were to be construed as a separate ordinance, it is clear that the State wanted the substitute ordinance to be given its initial interpretation by the State court, and the State had that right under the Eleventh Amendment (and would, no doubt, have exercised that right, except for the fact that the federal action was filed before the state law became effective).

Watson v. Buck, 313 U.S. 387 (1941), (see Huffman 420 U.S. 592, at 600, fn. 14), bars such federal interference unless a state law is facially unconstitutional under the strictest of standards (incapable of being Constitutionally applied in every paragraph, sentence, clause, etc.).

For very practical reasons, the County of San Diego was entitled to a state court adjudication of the substitute ordinance under the Eleventh Amendment, because, as in this City of Henderson situation, the ordinance was new legislation which only a state court could authoritatively interpret or restrict. See U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), at 369:

> "we [the federal court] lack jurisdiciton authoritatively to construe state legislation."

and a State court has the duty to give a constitutional interpretation to a state law, if at all possible. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 61, 130 Cal.Rptr. 238, at 339 (1976):

> "We [the state court] are obliged to construe and interpret legislation in a manner which will uphold its validity. (Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 941-942, 83 Cal.Rptr. 686, 464 P.2d 142)."

See, also, Petition for Writ of Certiorari in City of Henderson et al. v. Nevada Entertainment Industries, Inc., No. 92-643 at pages 46-57.

Because Watson v. Buck: (1) is well known in relation to its reference in Huffman, (2) was cited and referred to in Dubinka at p 225; and (3) has been repeatedly cited to the Ninth Circuit in the City of Henderson 4 year record, it would appear that the Wiener Court's analysis should have considered the law expressed in Watson v. Buck. Instead, the Court stated at p. 267 that:

> "As Wiener states there is no reason why the California State Courts should mind if a federal court resolves his claims. We therefore agree with Wiener that the full predicate for Younger abstention was not met."

Petitioners contend that Justice Browning was remiss in his willingness to accept and

support the defense counsel's self-serving misstatements re Huffman abstention. There are a great number of well understood and popular reasons why a litigant should desire that the injunction suit be decided in the state court, including the Eleventh Amendment! See, also, Motion for Order to Show Cause in Opposition to Petition for Writ of Mandamus at Appendix __ page 7-7 et seq. of the Supplemental Brief in Case No. 93-1969 and Petition for Writ of Certiorari in City of Henderson, et al. v. Nevada Entertainment Industries, Inc., et al., No. 92-643, at pages 46-57.

The Wiener case is a clear example of improper federal interference in a "continuum" of state law: the interplay of two related state laws dealing with virtually the same "subject matter" [where the latter ordinance repealed and reenacted the text of a first ordinance with minor changes]. The "text" of the second State law, to which the federal civil rights

plaintiff objected in its federal civil rights action, involved text identical to the State law being reviewed in the pending State court action (where the federal plaintiff was the state defendant). When an existing state law is reenacted by a later state law in substantially the same terms, the unchanged provisions which are repeated in the new enactment are construed as having been continuously in force. See Sutherland, Stat. Const., (4th Ed.) Sections 23.28 and 23.29 and California authorities cited at fn 4 on page 407. In Wiener, the state defendant (fighting a "losing battle" in state court) sought to use 42 U.S.C. Section 1983 improperly as a device to relitigate the same "constitutional" issues in federal court, and thus prolong enforcement of the state law against their business operation and did so by filing his federal action before the amendment ordinance became effective.

The propriety of federal court interference in pending state adjudications,

involving a "continuum of subject matter," is the obvious concern of Huffman-Younger. The impact of having both a federal court and a state court examine the constitutionality of identical or inextricably-related state laws, is to set up a Constitutional "collision course."

I(C)

IF DUBINKA IS A CORRECT STATEMENT OF THE LAW, THEN THE CITY'S CROSS APPEAL MUST BE UPHELD IN ITS ENTIRETY, PURSUANT TO THAT AUTHORITY.

The very great importance of Dubinka v. Judges of the Supreme Court of the State of California, 23 F3, 218 to the Petition for Writ of Certiorari herein is its definitive analysis of the "subject matter jurisdiction" issue and its holding that a federal question which is raised in a federal complaint, filed pursuant to 42 USC Section 1983, may be within the subject matter jurisdiction of the U.S. District Court as to facial challenges, under the Feldman Doctrine, see Dubinka at p 222, yet not where that same Complaint is also subject to a valid Younger-Huffman

challenge, See Dubinka at p 222 et seq. See also Dubinka v. Judges of the Superior Court of the State of California, 23 F3,218 at 225 and 226 footnote 11.

Dubinka clearly establishes that the Ninth Circuit's analysis and orders on April 7 and May 4 are erroneous and inappropriate. If permitted to stand, such disparate results: Dubinka and Wiener (and Henderson) will (1) confuse the trial court's below which are faced with applying the Court of Appeals rules in resolving Huffman-Younger challenges at the trial level, and will (2) invite and encourage a continuation of the same type of improper federal court filings under the Civil Rights Act. A Writ of Certiorari should issue. Further, the substantial federal question involving the Eleventh Amendment which Dubinka avoided (see fn. 11 of Dubinda) is squarely before this Court on this Petition for Writ of Certiorari under

Rules 10.1(a) and 10.1(c) of the United States Supreme Court.

CONCLUSION

For all of the above reasons, the Judgment of the Court of Appeals and Memorandum Decision filed May 4, 1994 should be reversed and the case remanded with instructions (1) to reinstate the Opinion and Judgment which was entered on November 2, 1993; (2) on the grounds that the Court lacked subject matter jurisdiction in accordance with the analysis in Dubinka v. Judges of the Superior Court, 23 F3d 218 (April 8, 1994); and (3) finding that the City of Henderson is entitled to move in the U.S. District Court for a reasonable attorney fee under 42 U.S.C. section 1988 as the prevailing party on the issues of Huffman Abstention and lack of subject matter jurisdiction.

Further the May 4, 1994 Order of Dismissal of the Preliminary Injunction against the City upon an independent

Finding of Fact and lack of subject matter jurisdiction under the clean hands equity maxim; (1) coming as it does more than 4 years after Assistant City Attorney Conroy had unsuccessfully urged those grounds for Dismissal at the first hearing on the TRO in the District Court on April 27, 1990, and (2) which adverse ruling required the City Attorney's Office to seek other means (Huffman Abstention) to defeat the federal court's willingness to assume jurisdiction of the state matter, (alleged to present a civil rights claim) and (3) which now would operate in a manner which would unjustly defeat the City Attorney's right to move for a reasonable attorney fee under 42 U.S.C. Section 1988 as a prevailing Defendant in a Civil Rights Lawsuit on this Huffman Abstention issue, is inequitable.

Dated: Oct. 11, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record

APPENDIX C

LIST OF 38 JUDGES NOW SITTING ON U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Reference: Petitioners' Supplemental Brief in 94-662 at page 15.]

Text at page 15 reads:

"The present problem in the Ninth Circuit is a magnification of that ground. Counsel of Record submits that of the 38 judges on the Ninth Circuit (see attached list at Appendix C), only those participating in Dubinka have demonstrated a clear understanding as to the "jurisdictional" (subject matter jurisdiction) meaning of Younger-Huffman abstention, and its interaction with the Eleventh Amendment. Argument in relation to the Eleventh Amendment, as in this case, is shunned as thought it were a plague, rather than a revered constitutional right belonging to each Sovereign State."

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Ninth Circuit

(Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Alaska, Hawaii, Guam, Northern Mariana Islands)

Judges:

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4192 U.S. Courthouse
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